

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR PETITIONER NEDLLOYD LINE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

293

17,218

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" and KONINKLIJKE
ROTTERDAMSCH LLOYD, N. V. as participants in a joint steamship
service under the trade name "NEDLLOYD LINE",

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

17,222

SOUTH AFRICAN MARINE CORPORATION, LTD.,

Petitioner.

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

17,224

FARRELL LINES INCORPORATED,

Petitioner.

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

**ON PETITION FOR REVIEW OF FEDERAL
MARITIME COMMISSION ORDER**

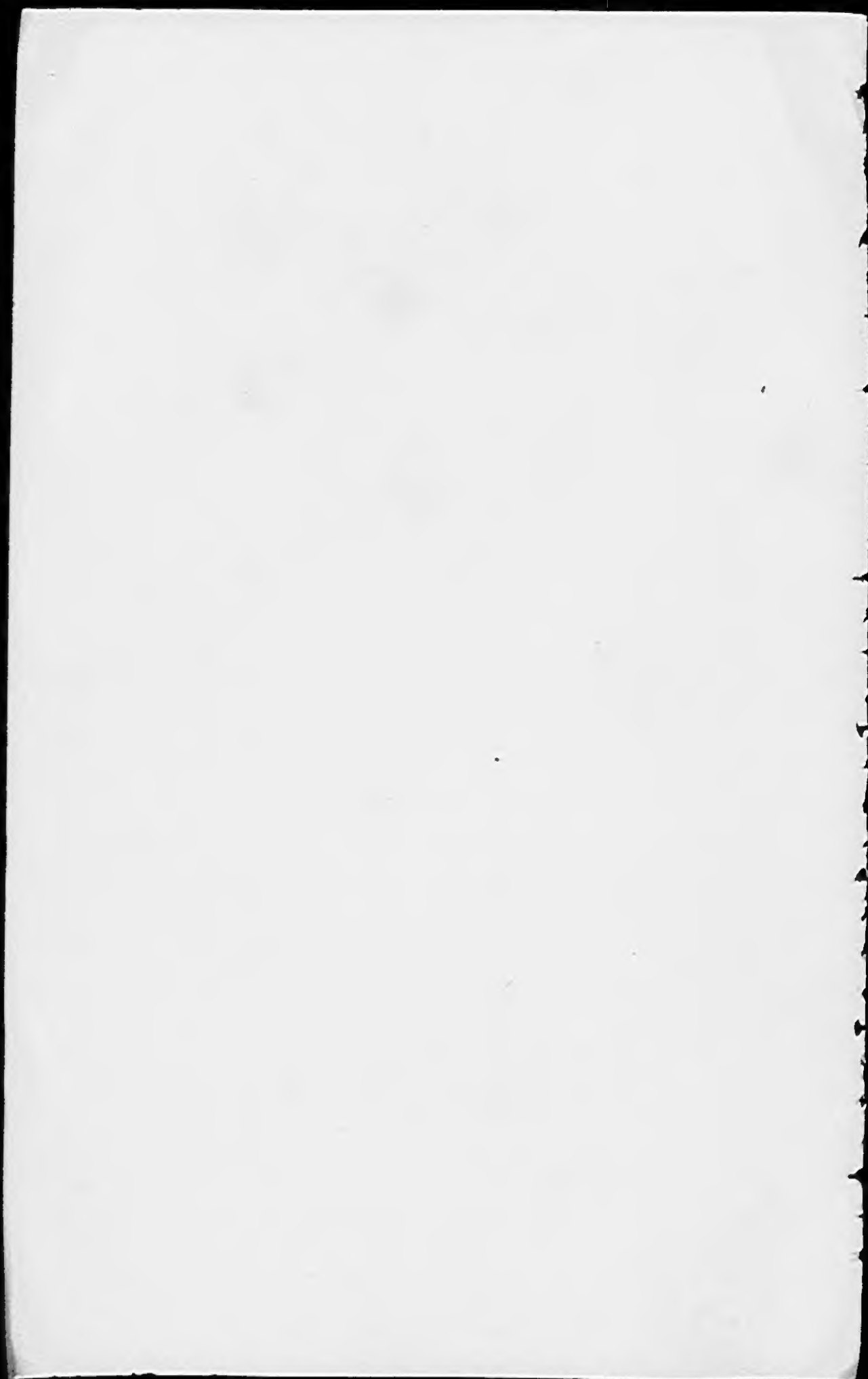
United States Court of Appeals
for the District of Columbia Circuit

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Questions Presented

1. Was Nedlloyd given the notice of the violations charged against it to which it was entitled under Section 5 of the Administrative Procedure Act (5 U. S. C. 1004) and under elementary principles of justice?
2. Did the Commission err in finding that Nedlloyd had violated Section 15 of the Shipping Act, 1916 (46 U. S. C. 814) by entering into an agreement despite the fact that the provisions of the Act and the Commission's charges related only to the "carrying out" of agreements?
3. Under Section 15 of the Shipping Act, 1916, could Nedlloyd be held liable for activities of its agent, even though Nedlloyd did not participate in such activities and in fact had explicitly prohibited them?
4. Can any responsibility be imputed to Nedlloyd under Section 15 of the Shipping Act, 1916, for following some, but by no means all, of the rates fixed by the dominant carriers in the trade?
5. Was there legitimate evidence in the record of any "agreement" on the part of Nedlloyd in the sense contemplated by Section 15 of the Shipping Act, 1916?

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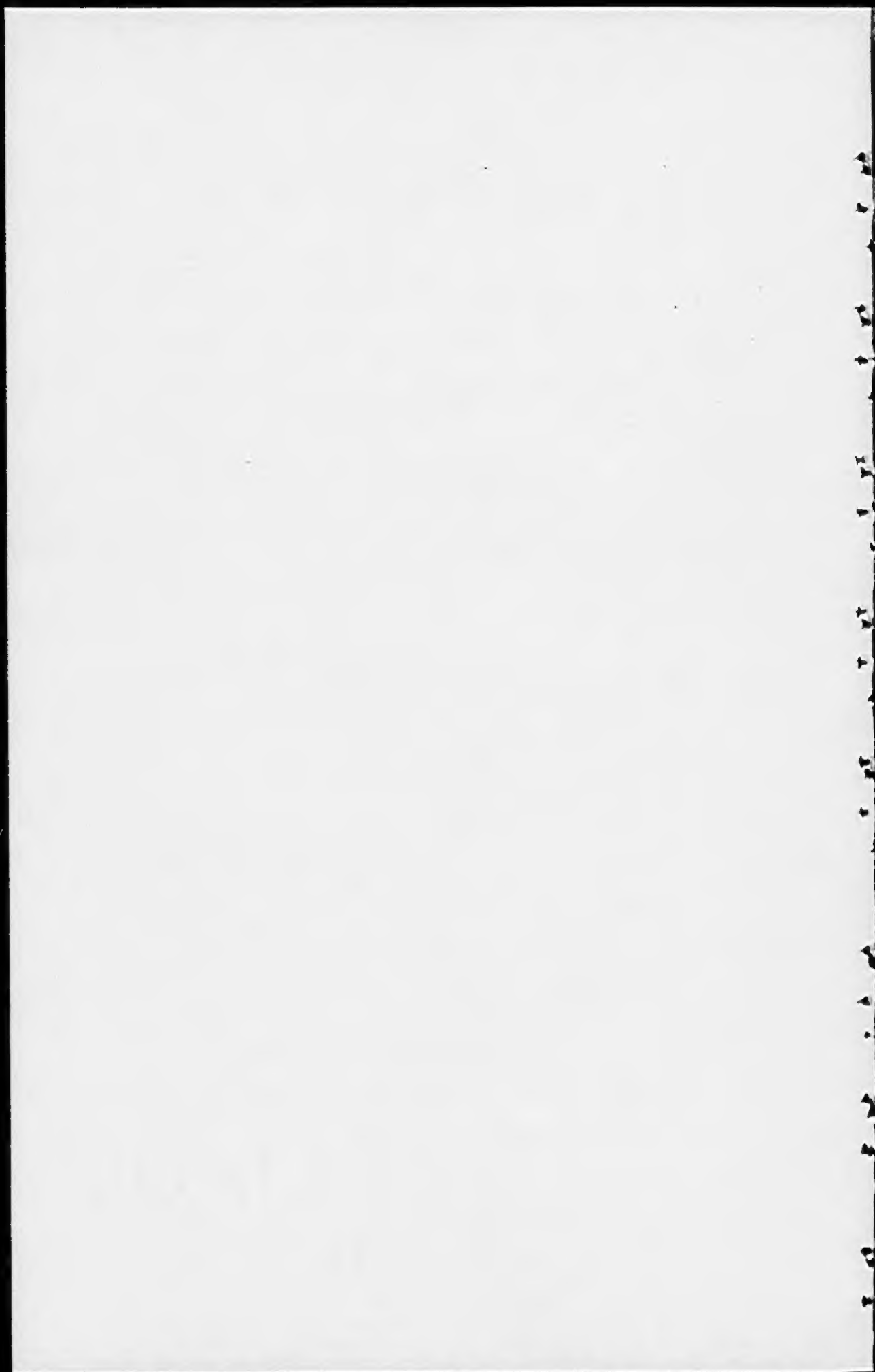
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,218

Consolidated with Nos. 17,222 and 17,224

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" and KONINKLIJKE ROTTERDAMSCH LLOYD, N. V. as participants in a joint steamship service under the trade name "NEDLLOYD LINE",

Petitioners,

against

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

BRIEF FOR PETITIONER NEDLLOYD LINE

Jurisdictional Statement

Petitioners N. V. Stoomvaart Maatschappij "Nederland" and Koninklijke Rotterdamsche Lloyd, N. V., parties to approved joint-service Agreement No. 7661 and operating as Nedlloyd Line (hereinafter referred to as "Nedlloyd"), are common carriers by water in the foreign commerce of the United States and are aggrieved by a final order of the Federal Maritime Commission (hereinafter referred to as the "Commission"), dated June 19, 1962. (JA 70)* Petitioners filed their petition to review said order on August 14, 1962. The jurisdiction of this Court is based upon 5 U. S. C. §§ 1032 and 1034; the venue in this Court is based on 5 U. S. C. § 1033.

* "JA" references are to Joint Appendix.

Statement of Case

1. By order of January 7, 1960, and amendment of January 15, 1960, the Federal Maritime Board (predecessor of the Commission) initiated an investigation to determine whether any of the named respondents (Dreyfus, Farrell, Lykes, Nedlloyd, Robin Line, Moore-McCormack, Safmarine), between 1954 and 1959, had carried out before approval under Section 15 of the Shipping Act, any agreements affecting the trade between the United States and South Africa requiring such approval. By the January 15, 1960, amendment to the order, the issues as affecting Farrell and Moore-McCormack were enlarged to include a charge of violation of Section 14 of the Shipping Act, 1916 (JA 3) and by the June 27, 1960, order Baron Iino was brought in as additional respondent. (JA 10)

2. Testimony was taken at hearings held August 2-5, 1960 in Washington and October 13-14, 1960 in New York, with further New York sessions on October 17-18, 1960. The transcript of the record of these proceedings consists of more than a thousand pages. 220 documents were marked for identification, of which 55 were received in evidence.*

3. After full briefing, the Examiner, on August 3, 1961, handed down his recommended decision, holding that none of the respondents had entered into or carried out during the 1954-1959 period any agreement as described by the Board's order of investigation. Accordingly, he recommended that the charges against the respondents be dismissed. (JA 87-115)

4. Public Counsel filed exceptions to the Examiner's decision and on the basis of such exceptions the Federal Maritime Commission, on April 9, 1962, handed down a

* These include documents identified or offered by parties other than Public Counsel.

devastating 52-page opinion reversing the Hearing Examiner and holding that all respondents, other than Baron Iino, had violated Section 15 of the Shipping Act, 1916 as charged. Without distinction every document offered was admitted into evidence. All of the respondents, except Baron Iino, filed petitions for re-opening and reconsideration, which were promptly denied by order of June 19, 1962. (JA 12-68; 70-72)

5. At the beginning of the year 1954, the carriers operating in the trade between United States Atlantic and Gulf ports and South and East Africa were Farrell, Robin Line, Dreyfus and Safmarine, together with the British South & East Africa Group. Only Farrell and the British Group were members of an approved conference (Agreements Nos. 3578 and 3579). When the British Group discontinued service in 1955, Farrell was the only remaining member. (Commission Decision, JA 18-19)

6. "Nedlloyd" is a trade name of the joint service of N. V. Stoomvaart Maatschappij "Nederland" and Koninklijke Rotterdamsche Lloyd, N.V., operating under approved Agreement No. 7661. Their New York agent was Java-Pacific Line, Inc. (JA 186-7)

7. Nedlloyd did not commence its service until January 1954. (JA 188-9) Its service constituted only a small part of its world-wide shipping activities and its one sailing per month (JA 189) in the inbound trade was on a completely different routing from that of the other carriers. Nedlloyd's vessels returned to the United States through the Suez Canal and the Mediterranean, while the others proceeded around the Cape of Good Hope and thence to the United States. (JA 188-9; 197-8)

8. Nedlloyd's policy, as directed by its principals, was to follow as closely as possible—but by no means blindly—

the conference rate structure but not to enter into agreements with the other carriers. (JA 187, 223-4)

9. Pursuant to Section 15 of the Shipping Act, 1916, Farrell and Robin Line submitted to the Federal Maritime Board, and on July 2, 1956, the Board approved, Agreement 8054 permitting these carriers to agree on rates and other tariff matters in the trade, with the reservation that either could alter for itself the agreed rates and related matters after giving the other party at least 48 hours' notice. Moore-McCormack (as successor to Robin Line), Lykes, Nedlloyd and Safmarine subsequently became parties to this agreement: on August 19, 1957, in the case of Moore-McCormack, and on April 3, July 28 and September 10, 1958, respectively, in the case of the others. Neither Dreyfus nor Baron Iino ever became parties to Agreement 8054. (Commission Decision, JA 19)

Statutes Involved

(a) Shipping Act, 1916, Section 15—39 Stat. 733; 46 U. S. C. 814:

"Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight

or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation."

.

(b) Administrative Procedure Act, Section 5, 60 Stat. 239; 5 U. S. C. 1004:

.

"(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice

of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading."

Statement of Points

I. Nedlloyd was never given proper notice of violations charged against it.

II. There was no violation of Section 15 on the part of Nedlloyd Line.

- (a) Carrying Out
- (b) Lack of Authorization
- (c) Lack of Agreement
- (d) Parallel Rates .

III. The Commission erred in receiving all documents offered in evidence.

Summary of Argument

Nedlloyd was not merely denied proper notice of the matters with which it was charged, as required under the Administrative Procedure Act and under elementary standards of justice, but it was affirmatively misled. The necessity for adequate notice was recognized by the Hearing Examiner and even by Hearing Counsel, but respondents' demands and the Examiner's admonitions went unheeded, with the result that—as against Nedlloyd—the Commission reversed the Hearing Examiner on grounds that had not been asserted and had not been the subject of testimony.

According to the Commission's initiating order, the only investigation in the proceeding was as to "carrying out" of alleged agreements. This was in accordance with the language of Section 15 of the Shipping Act, 1916, and in accordance with previous administrative construction of

the Commission's predecessors. On the subject of "carrying out" by Nedlloyd, the Commission proceeded to reverse all previous administrative interpretations, including all those applicable at the time the events took place, and to substitute a novel *ex post facto* ruling that proof of "carrying out" is unnecessary to establish a violation of the Act. In so doing the Commission was wrongfully applying retroactively a 1961 amendment of Section 15 of the Shipping Act, 1916, to the 1954-1958 activities of the carriers.

In the case of Nedlloyd, not only was there no binding agreement, there could be none. The principals in Amsterdam and Rotterdam had specifically instructed their United States agents not to enter into any agreements with other carriers. Special authorization had to be obtained to accede to Agreement No. 8054 to which all respondents save Dreyfus and Baron Iino became parties.

There was no agreement by Nedlloyd in any sense contemplated by Section 15 of the Shipping Act, 1916, or by any established legal standards. The mere obtaining of rate information—or even the exchange of rate information—does not constitute an agreement nor does following some, but by no means all, of the other carriers' rates. The following of the dominant carriers' rates in some particulars is and has long been a usual and necessary practice of smaller and slower carriers in competition with the larger operators.

The Commission erred in admitting into evidence over vigorous objection and relying upon every document offered by Public Counsel (prosecutor). These documents were largely irrelevant and immaterial and hearsay even to the third and fourth degree, as the Hearing Examiner properly found.

The Hearing Examiner's more carefully reasoned and factually and legally accurate decision should have been followed.

ARGUMENT

I

Nedlloyd Was Never Given Proper Notice of Violations Charged Against It.

As will be hereinafter enlarged upon, Nedlloyd was a small carrier playing only a minor part in the trade and was not susceptible to more than peripheral involvement in the extraordinarily broad issues tendered by the Board's January 7, 1960 order, pursuant to which the proceeding was inaugurated. That order referred to "agreements within the contemplation of Section 15 of the Shipping Act, 1916 (46 U. S. C. 814)" and then went on to recite:

"IT FURTHER APPEARING that the purported agreements referred to above have not been filed for approval under Section 15 nor approved thereunder *and may have been carried out*", * * *

"IT IS ORDERED that an investigation is hereby instituted to determine whether any of the persons named above *have carried out* before approval under said Section 15 any agreements requiring such approval, in violation of Section 15". [emphasis added]

The January 15, 1960, amendment of the Board's investigation order—insofar as it related to Section 15 (the only section with which Nedlloyd is concerned)—followed precisely the same pattern and again emphasized that the sole matter of inquiry was as to the "*carrying out*" of agreements without Board approval.

Even if limited to the "*carrying out*" of agreements—which the ultimate decision was not—the issues were of the broadest possible nature, for the alleged agreements were in no way specified, and a five-year period (1954 through 1958) was involved. It is not surprising that under these circumstances the respondents, including Nedlloyd, should seek particularization of the charges which would be made against them. This was in pursuance of Section 5 of the Administrative Procedure Act (5 U. S. C. 1004) as well as

the Commission's own rules (Rule 5[m]). Nedlloyd, because of its limited participation in the trade, was particularly curious to learn in what possible way it was claimed to have been involved in this proceeding.

The respondents could scarcely do better than adopt the statement of the Board's own Public Counsel who, although acting in the nature of prosecutor and charged with the development of the case, is now completely disavowed by the present Commission. He said in a memorandum in relation to respondents' requests:

"Certainly no 'adjudication' can be had except on evidence introduced at a hearing, and it is at the hearing stage of this proceeding that respondents will be called upon to defend themselves. Fair play requires that the respondents be timely informed as to the charges which they must meet."

No particulars were forthcoming until vast quantities of documents had been produced pursuant to subpoena and the first hearing had been held in Washington—indeed, not until some four weeks after the close of that initial hearing, at which the Hearing Examiner had stated (JA 198):

"I confess that I have great sympathy for all parties, including Public Counsel, but it is obvious to me that the respondents are entitled to a more direct specification of such charges, if they may be termed that, and as to which of the respondents have agreed with which other respondents, and that I think that . . . [it] would be in order that, within a period to be fixed, such information be supplied to respondents."

The Examiner's direction resulted in the issuance of a "Statement of Violations which will be asserted by Public Counsel". (JA 72) In so far as they related to Nedlloyd, the specifications may be summarized as follows:

1. That during the months of December 1954 and January 1955 all of the respondents orally agreed with each other (a) to increase freight rates and (b) not to

change rates in the future without giving some advance notice to, and discussing such change with, the other respondents.

2. That, if Nedlloyd and others did not enter into such an agreement, they did conform to an agreement among other carriers, which they failed to file with the Board.

3. That during the month of August 1954 Nedlloyd agreed with others to quote the same rate and conditions for the transportation of lepidolite.

None of these matters was dealt with in the Commission's decision. Insofar as Nedlloyd is concerned, item No. 1 had been abandoned by Public Counsel; No. 2, relating to conforming, was properly stricken by the Hearing Examiner as inconsistent with the Board's order of investigation; and No. 3, concerning an alleged agreement on lepidolite, was later abandoned, presumably because the evidence plainly established that Nedlloyd had never carried a pound of it. (JA 224) At the close of the hearing and after all of the evidence was in, Public Counsel for the first time charged Nedlloyd with having agreed on rates for other and completely different commodities, namely kapok, paraffin wax and copper. None of these commodities had ever been referred to in any specifications nor did Nedlloyd have any reason to produce any testimony concerning them. The Examiner properly found that there was no evidence that Nedlloyd had carried any of these commodities at rates agreed upon with any of the other respondents. (JA 111)

The Commission's decision failed to deal with any of the specific points theretofore raised in relation to Nedlloyd. It did in a way recognize Nedlloyd's special position in the trade, but nevertheless lumped it in with the other respondents. After dealing with the earlier activities of other carriers, the Commission eventually made the following observations with respect to Nedlloyd:

"Nedlloyd's interests mainly concerned a limited number of commodities moving in the inbound U. S. Atlan-

tic trade. It sailed to Africa from the U. S. Pacific Coast. During 1954 and thereafter it exchanged rate information with the other lines, usually through Farrell's agent, the secretary of USA/South Africa Conference. This included consultation and concurrence in rate changes, as well as the initiation itself of rate proposals on which it directly secured agreement from the other respondents." (JA 49)

These conclusions, which are the only ones specifically against Nedlloyd, are not in any sense in accordance with the Commission's original order which related only to an investigation of *carrying out* unfiled agreements. What is involved, as we read it, is a conclusion (not supported by the evidence) that Nedlloyd had perhaps "concurred in" an arrangement of others for giving advance notice of rate changes. This charge was dismissed by the Hearing Examiner as not covered by the Board's original initiating order and for that reason was not subsequently dealt with. The insinuation that Nedlloyd in some way initiated rate proposals and secured agreements on them was not suggested by the original initiating order nor by any specification of charges at any time during the hearings and, as shall hereinafter be established, was not supported by the evidence.

In order to rationalize the astounding and unprecedented results of its vituperative decision, the Commission announced *ex post facto* the novel and unprecedented theory that the whole proceeding was not an adjudicatory proceeding at all but simply something in the nature of a routine investigation to see whether there were any possible violations of the Shipping Act, 1916, or—as the Commission so glibly put it—to establish that there were none. (JA 21) Carrying this proposition to its full illogical conclusion, the Commission ended by finding every respondent guilty (except Baron Iino which, for some unexplainable reason, received preferred attention) and then discontinuing the proceeding.

Under this happy (for the Commission) arrangement, no rules of evidence need be complied with; all common law or statutory safeguards can be disregarded; and no attention need be paid to any extenuating circumstances.* Any protests against this procedure are thrust aside with a reminder that the investigation was merely discontinued. This ostrich-like approach, of course, completely overlooks the fact that the matter was immediately referred to the Department of Justice, which promptly proceeded against the respondents in the United States District Court for the Southern District of New York (62 Civ. 3208) to collect penalties at the rate of \$1,000 per day for violation of Section 15. This is hardly facing realities.

The Commission relies on *United States v. Morton Salt Co.*, 338 U. S. 632 (1950). Its reference to that case (Decision, p. 10) is as follows:

"Investigation is indispensable to the administrative regulatory function and may be undertaken 'merely on suspicion that the law is being violated, or even just because [the agency] wants assurance that it is not.' *United States v. Morton Salt Co.*, 338 U. S. 632, 642-43 (1950)."

It is of singular interest that, only ten months before the Commission's decision, this very Court per Bazelon, C. J. made its own analysis of precisely the same words with diametrically opposite results. In *Montship Lines, Limited v. Federal Maritime Board*, 111 U. S. App. D. C. 160, 295 F. 2d 147, it said:

"Respondents, relying on *Morton Salt*, contend that no detailed specification of purpose is necessary when an agency is investigating 'merely on suspicion that the law is being violated, or even * * * because it wants assurance that it is not.' If this order is pursuant to

* Except, apparently, as they affect *Baron Ino Line*, although the Commission's decision will be read in vain for any distinction between that Line's position and *Nedlloyd's*.

such an investigation, a matter which the Board contends in its brief but which does not appear from the face of the order, it might be argued that a *detailed* specification at this stage of 'initial inquiry' may not be feasibly required. Whatever may be the validity of that argument, we think it cannot excuse the absence of any indication whatsoever, as in the instant order, of the investigation's purpose since no basis is thereby afforded for determining the relevancy of the information demanded. And just as the reasons underlying agency action must appear from the agency's order, so too we think that the statement of purpose must be apparent from the order itself and cannot be supplied by contentions in the briefs." (p. 155)

This Court's decision in *Montship*, laying emphasis on the fundamental element of fairness by way of due notice, has ample support in controlling Supreme Court decisions. *Morgan v. United States*, 298 U. S. 468; 304 U. S. 1; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 165. For the reasons therein set forth the Commission's failure to apprise Nedlloyd of the charges against it in this case vitiates the entire proceedings before it and requires that its April 9, 1962 decision be vacated and set aside.

II

There was no Violation of Section 15 on the Part of Nedlloyd Line.

The Hearing Examiner made extensive findings in respect of Nedlloyd. These factual findings have not been questioned by the Commission, and there is nothing in the Commission's decision in any way controverting them. Therefore it can be properly said that these facts are not in dispute and can serve as a setting for consideration of Nedlloyd's position in this case. We quote from the Examiner's decision (JA 101) inserting in brackets the supporting pages of the record:

"Respondent Nedlloyd entered this highly competitive trade in January 1954 (JA 188-9, 197-8) operating one

sailing a month from United States Pacific Coast ports (JA 188-9), vessels in this run loading no cargo at either Gulf or Atlantic Coast ports (JA 188-9). The route followed differed from that of the other lines, the Nedlloyd vessels proceeding around Africa from south to north and returning through the Suez Canal to New York and sometimes to the Gulf (JA 188, 197-8). Transit time was about 10 days longer than that of the vessels that sailed from Cape Town directly to the United States (JA 198). Nedlloyd operated as a non-conference line but its operations did not disturb the trade because of its general policy of following the homeward conference rates and of exchanging rate advices with the conference (JA 187, 223). Approximately ten items in the homeward trade to the Atlantic ports are the only ones of importance to Nedlloyd and at times it has had rates on about half of them that differed from the rates of the other lines (JA 225-6). Unless authorized by its principals, the Nederland Line of Amsterdam and the Royal Lloyd of Rotterdam, to do so Nedlloyd is forbidden to enter into any agreements with other carriers (JA 223). The only exception of record is Agreement No. 8054, mentioned later, for which special authorization to sign was received." (JA 223)

(a) Carrying Out

At the outset it must be emphasized that the only Section 15 violation charged by the Board's orders inaugurating the investigation was the *carrying out* of agreements. At the hearings both Public Counsel and the respondents proceeded on this basis. This was also clearly recognized by the Examiner's determination of the case in respect of Nedlloyd. He said (JA 111):

"Public Counsel's specification of charges to be asserted contained no references to any alleged agreements of Nedlloyd through the Secretary of the South Africa/U. S. A. Conference with the member lines respecting rates on kapok, paraffin wax in bags, and copper. As there is no evidence that Nedlloyd made or carried out any such agreements there is no showing

of failure to file such agreements for approval under Section 15 of the Shipping Act, 1916, and the request for conclusions 7, 8 and 9 is denied."

This was in accordance with the law as it then stood. The chief problem lies in the fact that the Maritime Commission, as distinguished from the Maritime Board, attempted in its decision to apply the law as it was amended on October 4, 1961, some three years after the events charged. For a clear appreciation of the point involved, it is necessary to compare the pertinent provision of Section 15 as it existed before and after October 4, 1961:

Prior to October 4, 1961
(Old Law)

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Subsequent to
October 4, 1961
(P. L. 87-346)

*Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications and cancellations shall be lawful only when and as long as approved by the Commission; before approval and after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; * * **

[emphasis supplied to indicate more sharply the new material added.]

The change was very likely brought about by testimony before the Antitrust Subcommittee of the Committee of the Judiciary of the House of Representatives in October 1959 by the then Chairman of the Federal Maritime Board.

Clarence G. Morse. He was questioned by Representative Meader as follows (Hearings before the Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, 86th Congr., First Sess., Part I, Vol. I, p. 71):

"Mr. Meader. Mr. Chairman, section 15 requires that common carriers file immediately with the Board a copy of the agreement. And then is it your interpretation of the section that failure to file an agreement is a violation of Section 15?

Mr. Morse. I think the penalty is not for the entering into an agreement, but acting under the agreement.

.

Mr. Morse. I cannot answer your question specifically, whether the entering into an agreement, but not taking any action under the agreement, and failing to file that agreement, would be a violation of section 15, because if you look to the fourth paragraph, I think it is, it says:

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation.

Now, what I am saying is that paragraph seems to place the impropriety on carrying out an agreement rather than the entering into the agreement.

.

Mr. Meader. Then the day when the thousand-dollars-a-day penalty commences to run is when some action has been taken under an agreement.

Mr. Morse. That has been our interpretation.""

* Some reservations on this subject were expressed by Mr. Aptaker, a lawyer on the Commission's staff (p. 74; see also Mr. Morse's further testimony on pp. 75-76).

Mr. Morse's testimony in this respect is of particular significance, since he was Chairman of the Federal Maritime Board at the time that the events complained of are alleged to have taken place.

During the 1954-1959 period and prior thereto, the Commission's predecessors had consistently adopted the views expressed by Chairman Morse. *City of Portland v. Pacific Westbound Conf.*, 4 F. M. B. 664, 674 (1955); *Pacific Coast European Conf.—Limitation of Membership*, 5 F. M. B. 39, 45 (1956); *Associated-Banning Co. v. Matson Nav. Co.*, 5 F. M. B. 336, 343 (1957).

The cases cited involve far more than the *obiter dicta* grudgingly acknowledged by the present Commission. (JA 59) They represent the clear, unwavering position of the agency then charged with the enforcement of the law. That this was intended to be so understood by the parties affected is shown by the Board's language in *Pacific Coast European Conf.—Limitation of Membership*, Docket 792, 5 F. M. B. 39 (1956) where the Board said at page 45:

"It is only reasonable to assume that the conference knew, since it is charged with such knowledge, that section 15 may only be violated by effectuation of an unapproved or disapproved agreement between carriers. We cannot believe that the conference is truly in doubt in this respect."

Those are the words that the present Commission now seeks to forget and even deny. All of these decisions are long subsequent to the Supreme Court's opinion in *U. S. Navigation Co. v. Cunard S.S. Co.*, 284 U. S. 474 (1932), to which the Commission now adverts. (JA 61) However, no holding in that case governs present problems, as the Commission felt compelled to acknowledge; that decision related to contract rates and not to inter-carrier agreements of the type alleged to have been involved here.

The Commission's present position is not furthered by reference to its 1961 decisions in *Maatschappij "Zeetrans-*

port" *N. V. et al v. Anchor Line Ltd. et al* (Docket 833, decided January 23, 1962), 6 F. M. B. -----; and *Agreements and Practices Pertaining to Freighting Agreement—Gulf & So. Atl. Havana Conf.* (Dockets 849, 851, 854, decided February 2, 1961, 6 F. M. B. ----) These decisions, which were handed down long after the events involved in the present case, do not contain any reference to the necessity of "carrying out". As we read these cases, there was no occasion for this question to be raised, inasmuch as there had been a carrying out in each instance.

The original Section 15 language is logical enough and becomes confusing only if one attempts to adopt the Commission's present construction. Section 15 was designed, as the Commission recognizes, to provide a means of exempting intercarrier agreements from the antitrust laws, in exchange for which the regulatory agency was given control over such agreements. When the section in question provides that the agreements shall be lawful only when approved, it is perfectly clear that until such approval they are not afforded protection from the antitrust laws. On the other hand, it is but natural that the only offense under the Shipping Act, 1916, should relate to the carrying out of an agreement, that is, the taking of some prohibited action. If the mere making of an agreement were to constitute an offense, as the Commission now asserts, the sentence in question would be wholly redundant.

The Commission's confusion as to the status of unapproved Section 15 agreements was never shared by this Court. As long ago as 1954 Judge Bazelon explained in *Isbrandtsen Co. v. United States*, 93 U. S. App. D. C. 293, 211 F. 2d 51, cert. den. 347 U. S. 990 (1953):

"This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with

the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal *per se.*" (p. 57)

The Commission's present novel construction of the 1916 Act, as it existed before its 1961 amendment, rests upon a reading of the introductory language of Section 15 in immediate conjunction with the final "penalty" clause. This is wholly unwarranted. The provisions for the filing of the agreement contained in the first paragraph of that Section are purely procedural, just as are the provisions in the second paragraph relating to approval and disapproval by the agency. Nothing is made "unlawful" prior to the third paragraph, and there is nothing in the procedural arrangements theretofore referred to which would in any way justify the imposition of a penalty for failure of compliance.

If Congress felt that the Act was inadequate to make the mere making of an agreement punishable (as the Commission acknowledges (JA 59-61)), surely the carriers are entitled to construe it likewise. This is especially so when they had every reason to rely upon the agency's consistent construction of the Act in the cases hereinabove referred to.

What the Commission in effect seeks to do in its decision is to justify its conclusions of violations under the amended law when, in fact, the events involved took place some 3-8 years previously. There is nothing in the 1961 amendment to justify any retroactive effect, and none should be given it. Even if there had been no amendment of the statute and the Commission had merely decided to change its interpretation of the law, there is no moral or legal basis for making such a new interpretation retro-

active. In *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F. 2d 141 [CA 9th, 1952], the Court said:

"We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors." (p. 149)

See also *Lesavoy Foundation v. Commissioner of Internal Revenue*, 238 F. 2d 589, 594 [CA 3rd, 1956].

The Examiner in the instant case found no carrying out by respondent Nedlloyd. His finding in this respect is not reversed or even specifically commented upon. Therefore, the Commission's decision must be reversed.

(b) Lack of Authorization

All actions on the part of Nedlloyd in this case were those of its agent Java-Pacific Line, Inc., a New York corporation which employed the individuals mentioned in the Commission's decision (Mr. Severiens, Mr. Drost, Mr. Keers). The Examiner properly found (JA 101) that the principals abroad had specifically forbidden Java-Pacific Line, Inc. to enter into any agreements with other carriers. The only exception of record was Agreement No. 8054, for which special authorization was given. These findings had full support of the testimony of the only witnesses called on the subject: Mr. Keers and Mr. Drost (JA 193, 196-7, 223). There was no testimony to the contrary; there is nothing to the contrary in the Commission's decision; the finding must therefore stand.

This is not a contract case where some third party, relying on the doctrine of "apparent authority," seeks to recover against Nedlloyd on a contract claimed to have been made by an agent. As the testimony shows, the other carriers confirmed the denials of the Nedlloyd witnesses and did not claim any agreement with that line (Robin [Flad, JA 153]; Farrell [Gorman, JA 158]; Lykes [O'Kelley, JA 166]; Safmarine [McGrath, JA 168-9]). No third party was in any sense injured by anything done or not done by Nedlloyd nor, as demonstrated above, was there any carrying out of any agreement.

Section 15 of the Shipping Act, 1916, provides for the imposition of substantial penalties in the event of specific violation. Yet no penalty can be imposed for a legal infraction to which the principal has never, expressly or impliedly, given his assent. This principle was clearly enunciated in *United States v. Corlin*, 44 F. Supp. 940 (S. D. Calif., 1942), where the court said:

"The principle I have in mind is that there is no criminal responsibility of a principal for the acts of his agent unless the principal knowingly and intentionally aids, advises, or encourages the criminal act committed by the agent. *People v. Armentrout*, 1931, 118 Cal. App. Supp. 761, 1 P. 2d 556. In *Nobile v. United States*, 3 Cir., 1932, 284 F. 253, 255, the Court said: 'Criminal liability of a principal or master for the act of his agent or servant does not extend so far as his civil liability. *He cannot be held criminally for the acts of his agent, contrary to his orders, and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly.*' And see my opinion in *United States v. Food and Grocery Bureau of Southern California*, D. C., 1942, 43 F. Supp. 906." (p. 946)

See also *Nobile v. United States*, 284 Fed. 253, 255 (CCA 3rd, 1922); *Holland Furnace Co. v. United States*, 158 F. 2d

2, 8 (CA 6th, 1946). This important point was not even dealt with by the Commission although it should have been. Had the Commission done so, it would have been compelled to conclude that there was no basis for a charge against Nedlloyd.

(c) Lack of Agreement

The Nedlloyd witnesses testified unconditionally that Nedlloyd had no agreement of any kind (JA 193, 196-7, 223, 226-7). Any conclusions to the contrary must be based on inferences, principally on alleged conversations with a Mr. Phillips, the Conference Secretary, who was not called as a witness. The Nedlloyd witnesses made it perfectly clear that they endeavored to keep themselves informed as to the Conference rates against which they had to compete. To this end, they obtained particulars from the best source, Mr. Phillips, and in return were willing to post him as to the Nedlloyd rates (JA 189, 192). From this the Commission would infer some sinister arrangement.

No such inference is in order. As was said in *Texas Co. v. Hood*, 161 F. 2d 618, 620 (CA 5th, 1947), *aff'd* 332 U. S. 829:

“Where two equally justifiable inferences may be drawn from the facts proven, one for and the other against the Plaintiff, neither is proven, and the verdict must be against him who had the burden of proof. *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819. Moreover, where the Plaintiff's right of recovery depends upon the existence of a particular fact being inferred from proven facts, such inference is not permissible in the facts of the positive and otherwise uncontradicted testimony of unimpeached witnesses whose testimony is consistent with the facts actually proven, and which uncontradicted evidence shows affirmatively that the facts sought to be proved did not exist. *Pennsylvania R. Co. v. Chamberlain*, *supra*.

"In *Arnall Mills v. Smallwood*, 5 Cir., 68 F. 2d 57, 59, this Court said:

" 'Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence. *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819; *Winn v. Consolidated Coach Corporation*, 6 Cir., 65 F. 2d 256; citing cases.' "

There is a full and complete discussion of this subject in the decision of the District Court for the District of Columbia in *United States v. United States Gypsum Co.*, 67 F. Supp. 397, at pages 450 and 451 (D. C., D. C., 1946), reversed on other grounds, 333 U. S. 364. See also *Commercial Standard Insurance Co. v. Gordon's Transports*, 154 F. 2d 390, 394 (CA 6th, 1946).

The Commission's decision makes clear its predisposition to put the worst possible aspect on any testimony or document. This is shown by the zeal with which it seized upon the occasionally inexact use of the verb "agree". This word, as it is often loosely used in discussions, correspondence and even in testimony, did not mean the same thing as when used in the statute. The verb is used in a variety of contexts even in legal parlance: (Williston on Contracts [3rd Ed.] Section 2; Restatement of Law of Contracts § 3, comment a; 3 Corpus Juris Secundum, pp. 354-355.) The Century Dictionary lists seven usages. The primary definition is of importance here: "To be of one mind; harmonize in opinion or feeling".

It is submitted that the testimony, insofar as it relates to activities of respondent Nedlloyd, suggests nothing more than that Nedlloyd's representatives on some occasions—but by no means all—happened to be of the same mind as the representatives of some other lines. For

example, if the representative of one carrier says to another: "I agree that the right rate on barrel staves is \$15.00", there is only an indication that two people are of one mind on that subject (see Mr. Drost's testimony (JA 193, 193a)).

Section 15 has no application to "agreements" of this type. So far as Nedlloyd is concerned, the only legitimate question under the Act is whether this respondent, prior to signing Agreement No. 8054, in any way deprived itself of the right to act independently or assumed any disability with respect to its future rate-making activities. The record in this case abundantly demonstrates not only that the freedom of action was preserved, but that it was utilized.

Illustrations of the point involved are found in connection with Item 6 of the list of documents discussed in the Commission's decision (JA 31-2), the only document *admitted* into evidence which involves Nedlloyd. Item No. 17 was not admitted into evidence but Mr. Drost testified as follows with respect to it (JA 191-2):

"Q. Mr. Drost, there is quoted in this memorandum a telegram which reads:

'Farrell Robin Dreyfus SAFMarine Lykes we agreed increases as per circulars attached out lets,' etc.

A. Yes, sir.

Q. Can you tell us what you mean or meant by the use of the word 'agreed', there?

A. I don't know what the rates or subject was, but I do know that I must have been informed by Mr. Phillips that these rates had been agreed upon or had been consulted with, and they asked me, and I said, 'I think that this is a sensible rate'."

A further rejected item, No. 16, referred to by the Commission (JA 38), simply concerns communications still pending between the conference lines and Robin Line. The final rejected item, No. 22 (JA 40-1), refers only to a "gen-

eral recollection'' of a Robin Line witness of a previous conversation with a representative of Nedlloyd's agents (JA 150).

The peripheral interest of Nedlloyd is indicated by the fact that there are only four references to it in the 22 examples selected by the Commission.

Attributing some sinister purpose to the soliciting of freight information, as apparently the Commission does (JA 52-4), is a novel and rather shocking approach and provides no basis for a charge of violation of the Act. There is no more secrecy about freight rates than there is about quotations on the Stock Exchange. The Commission has given full support to the changes brought about by Public Law 87-346 for even greater publicity and has implemented the statute by its own rules. Public policy suggests that the greatest possible publicity be given to ocean freight rates as well as those of land carriers. There should be no possible objection to *exchange of information* on this subject, and certainly there is no possible support for a charge of violation of Section 15 of the Shipping Act, 1916, on the basis of it.

(d) Parallel Rates

The position of Nedlloyd on rates quoted is clear and positive. As a small non-conference carrier it tended to follow the rates of the Conference, but only when it was advantageous to do so. This was in accordance with instructions from the principals in Amsterdam when Nedlloyd inaugurated its service in 1954. Mr. Drost's testimony on this subject was as follows (JA 187):

"Q. Now, sir, will you tell us what the authority is of Java-Pacific with regard to the establishment and the alteration of freight rates charged by the Nedlloyd Line?

A. Well, our principals, Nedlloyd Line, who are in Holland, informed us that, when they commenced the serv-

ice from South and East Africa to the Atlantic Coast, we should follow conference rates generally, and perhaps with a few exceptions, where it is considered to their advantage to do so."

and again at page 841 (JA 223):

"Q. Mr. Drost, you testified previously in Washington, and I note at page 462 of the record of your testimony, a statement by you to the effect that your principals, Nedlloyd Lines, were establishing this service. You took the position that you should follow the Conference rates generally, with some exceptions. Have those instructions been carried out?

A. Absolutely been carried out."

That the rates of other carriers were not automatically followed is shown by Mr. Drost's further testimony (JA 225-6):

"Q. This tariff business, have you looked through your tariff at my request to sort of check on the principal commodities that you carried?

A. Yes. We made a sort of a study of it and found that out of a tariff which contains maybe 200 or more items, there are only about ten items which are of importance to us in the inward trade to the Atlantic.

Q. And of those ten items, have you had considerable rate variation on a number of them?

A. About half of them, we at times had different quotations than the other lines.

Q. That is, quotations different than the Robin or Farrell?

A. That's correct.

Q. And in what direction were those deviations from their rates—upward or downward or both?

A. Well, I would think somewhat higher in cases. We have carried, for instance, concentrates or ore concentrates at a higher rate, and we have carried it at

lower rates. We have had sisal matting and binder twine at, I believe, lower rates. But they were on a different basis. And we carry animals on different conditions than are in the tariffs of the other lines. And we have had occasion or, for instance, ferrochrome where we had a lower rate than they had."

This arrangement was a natural one because of Nedlloyd's unimportance in the overall trade. It was at a disadvantage with its slower vessels committed to a longer voyage in a direction opposite to that of the other respondents' vessels, and its service was generally uncompetitive except in respect of East African ports—the last ports in this trade called at on the voyage to America (JA 188-9, 196-7, 223-4). Nedlloyd came into the trade after the other respondents (Baron Iino excepted), when the rate pattern had already been set by others. Even so, Nedlloyd by no means followed blindly the rate pattern (JA 187-9, 223-4). As the above-quoted testimony shows, about 50% of the items important to Nedlloyd moved at rates different from those of the Conference (JA 225-6).

These circumstances are generally covered by the Examiner's findings (JA 101) and are not attacked by the Commission. On the contrary, they are supported by the Commission's own conclusions. (JA 18, 49) In the absence of any real evidence, the Commission's ultimate determination must be taken to rest on superficial parallelism between some of the rates.

There is no persuasive evidence showing any promise or undertaking on the part of Nedlloyd to charge the Conference rates, nor that Nedlloyd's conduct was based upon any real agreement with any of the other lines in the trade. As the Alexander Committee itself was aware, when, in 1914, it thoroughly investigated conditions then prevailing, that a policy of following another's rates need not involve any agreement at all. One section of its Report (H. R.

Rep. No. 659, 64th Cong., 1st Sess., p. 283) dealt with this very subject:

"In some instances one line will be sufficiently powerful to dominate the other lines and, without effecting any definite understanding, secure the desired conditions in rates. In fact, such domination was found to exist in nearly every instance where two or more lines serve a given route and no agreement was admitted. . . . In all of these illustrations the dominant line is so powerful that for the small competitors to start a rate war would mean their speedy elimination . . . The Norton Line, for example, is not a party to the agreement covering New York-River Plate trade; yet the conference lines keep the Norton Line posted as to the rates they are charging although that line is under no obligation to maintain the same . . ."

There is scarcely any trade served by several lines where such procedure is not in effect, either by following the dominant lines' rates at parity or, as is frequently done by independent lines in contract-rate system trades, at a differentially lower figure. This has been noted in a number of Maritime Board cases: *Contract Rates—North Atlantic Continental Freight Conference* (Docket 724), 4 F. M. B. 355, 360; *Anglo Canadian Shipping Co., Ltd., et al. v. Mitsui S.S. Co., Ltd.* (Docket 759), 4 F. M. B. 535, 539; *Contract Rates—Japan/Atlantic & Gulf Freight Conference* (Docket 730), 4 F. M. B. 706, 713; *Contract Rates—Transpacific Freight Conference of Japan* (Docket 743), 4 F. M. B. 744, 749. Yet never, until the present decision was handed down, was there any intimation that mere "conforming" involved any violation of Section 15.

The same tendency to arrive at a state of equilibrium can be found in the every-day charges which are paid for household articles. As the court pointed out in *United States v. Standard Oil of New Jersey*, 47 F. 2d 288, 316-17 (E. D. Mo., 1931):

"Grocers, butchers and all other lines in the same markets generally sell the same things at the same

prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices."

Apart from the special position of Nedlloyd, no unlawfulness should be found by the Commission on the simple basis of superficial parallelism. In *Meier & Pohlmann Furniture Company v. Gibbons*, 233 F. 2d 296 (CA 8th, 1956), cert. den. 352 U. S. 879, the Court said at page 302:

"Under this record we do not believe the actions of the various carriers in the cessation of the deliveries can be considered parallel. However, if so considered, the mere proof of parallel behavior does not conclusively establish that such behavior was induced by unlawful agreement."

III

The Commission Erred in Receiving All Documents Offered in Evidence.

The numerous documents produced at the hearings were not offered in evidence promptly after being identified, as should have been done. Instead, over the vigorous objection of counsel for Nedlloyd as well as counsel for other respondents (JA 148), the actual offering of the documents was deferred until the end of the hearings. At that time the Examiner properly ruled that each exhibit should be taken up separately (JA 229). During the full day and a half devoted to this process the admissibility of each document was thoroughly dealt with and ruled upon after argument by all parties interested.

The Commission now takes the position that, since only 29 of the documents offered by Public Counsel were received, the Hearing Examiner was necessarily in error in rejecting the others. The Commission's decision in reality goes further and blames respondents' counsel for objecting,

as though there were something improper in seeking to protect a client's interest in the face of vague and unspecified accusations. By taking advantage of the very procedure objected to by counsel, the Commission now states that "the exhibits had previously been tendered and identified and were for all practical purposes a part of the case."

The objections were on valid grounds, including relevancy, materiality and in many instances the ground of hearsay, in some cases three or four degrees removed. It should be apparent without further discussion that error must exist in the Commission's receipt of each and every document tendered over the objection of counsel.

The position of the Examiner was basically correct. He was simply following the ground rules laid down in *Practices of Fabre Line and Gulf/Mediterranean Conf.* (Docket 768), 4 F. M. B. 611, adverted to by the present Commission in support of its decision. These are also contained in the Commission's Rule 10 (p) and (q) (46 C. F. R. Secs. 201.156 and 201.157) and in Sections 7(c) and 10(e) of the Administrative Procedure Act, 5 U. S. C. §§ 1006(c) and 1009(e). As the Federal Maritime Board said in the *Fabre Line* case, *supra*, the Congressional intent underlying these sections of the Administrative Procedure Act is clear from legislative reports and judicial interpretation. In relation to evidentiary requirements, H. R. Report No. 1980 of the 79th Congress, 2d Session, states:

"Thus while the exclusionary 'rules of evidence' do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability and substantiality of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand. But they exist and must be rationally

applied. They are to govern in administrative proceedings."

On May 24, 1946, Representative Walter, on the floor of the House of Representatives, described the evidentiary requirements of Section 7(c) of the Administrative Procedure Act (5 U. S. C. 1006(c)) as follows:

"The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations—first, that the agency must examine and consider the whole of the evidence relevant to any issue and, secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—see *Edison Co. v. Labor Board* (305 U. S. 197, 230). Under this provision agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the whole of it." (Congressional Record, Vol. 92, part 5, p. 5653).

The Commission lays stress on the need for greater liberality in administrative proceedings, but as the Supreme Court said in *Interstate Commerce Commission v. Louisville and Nashville Railroad Co.*, 227 U. S. 88, 93:

"But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

The prime difficulty in the present case lies in the wholesale admission of hearsay evidence. The dangers inherent in reliance upon such evidence were emphasized in Mr. Justice Douglas' concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 180:

"The Loyalty Board convicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is a 'paragon of veracity, a knave, or the village idiot'. His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal."

The Commission's predecessors have consistently held that the right to a full hearing includes the right to cross-examine the witnesses: *The Tagit Co. v. Luckenbach Steamship Company, Inc.*, 1 U. S. M. C. 519; *Close v. Swayne & Hoyt, Ltd.*, 2 U. S. M. C. 68; see also *Powhatan Mining Co. v. Ickes*, 118 F. 2d 105, 109 (CA 6th, 1941). No right to cross-examination is provided where documents are admitted *en masse*, as would be the case under the Commission's suggested practice.

The serious errors in connection with the evidence are of themselves sufficient to justify the reversal of the Commission.

CONCLUSION

**The Decision of the Federal Maritime Commission
Should be Reversed and Set Aside and Petitioner Should
Have Such Other and Further Relief as to the Court
May Seem Just.**

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Nedlloyd Line***

**New York, N. Y.
February 4, 1963**

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the following documents:

- (a) Opening Brief for Petitioner NEDLLOYD LINE
- (b) Reply Brief for Petitioner NEDLLOYD LINE
- (c) Joint Appendix to Briefs and Reply Briefs in Nos. 17,218, 17,222 and 17,224
- (d) Statement of Corrections in opening brief of Petitioner NEDLLOYD LINE

upon all parties of record in this proceeding by delivering a copy thereof to each of the following:

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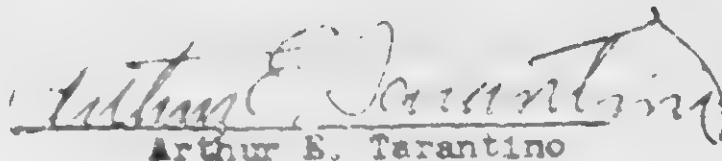
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April 15, 1963


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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,218

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND
and KONINKLIJKE ROTTERDAMSCH LLOYD, N.V.,
as participants in a joint steamship ser-
vice under the trade name "NEDLLOYD LINE",

Petitioners,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION,

Respondents,

No. 17,222

SOUTH AFRICAN MARINE CORPORATION, LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION,

Respondents,

No. 17,224

PACIFIC LINES INCORPORATED, Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION,

Respondents.

STATEMENT OF DECISION

Pursuant to Rule 18 (d) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit, on behalf of petitioner Nedlloyd, I hereby certify that - in addition to the insertion of "JA" references - the following two changes have been made in its February 4, 1963, opening brief:

(a) Page 2 (1): Second sentence has been amended to read:

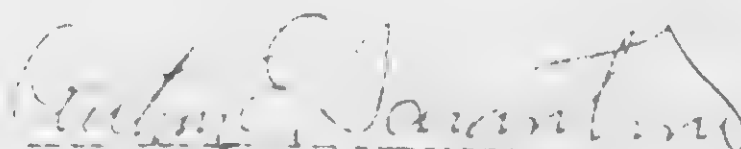
"By the January 15, 1960 amendment to the order, the issues as affecting Farrell and Moore-McCormack were enlarged to include a charge of violation of Section 14 of the Shipping Act, 1916 (JA 3) and by the June 27, 1960 order Baron Iino was brought in as additional respondent. (JA 10)"

(b) Page 10: Last sentence of first full paragraph has been amended to read:

"The Examiner properly found that there was no evidence that Nedlloyd had carried any of these commodities at rates agreed upon with any of the other respondents. (JA 11)"

and that there have been no further changes or corrections.

April 15, 1963


Arthur E. Tarantino

Attorney for petitioner
NEDELOYD LINE

From the
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BRIEF FOR PETITIONER

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,222

**SOUTH AFRICAN MARINE
CORPORATION, LTD.,**

Petitioner,

—against—

**UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION,**
Respondents.

**PETITION TO REVIEW ORDERS OF THE
FEDERAL MARITIME COMMISSION**

**HAIGHT, GARDNER, POOR
& HAVENS**

HOGAN & HARTSON

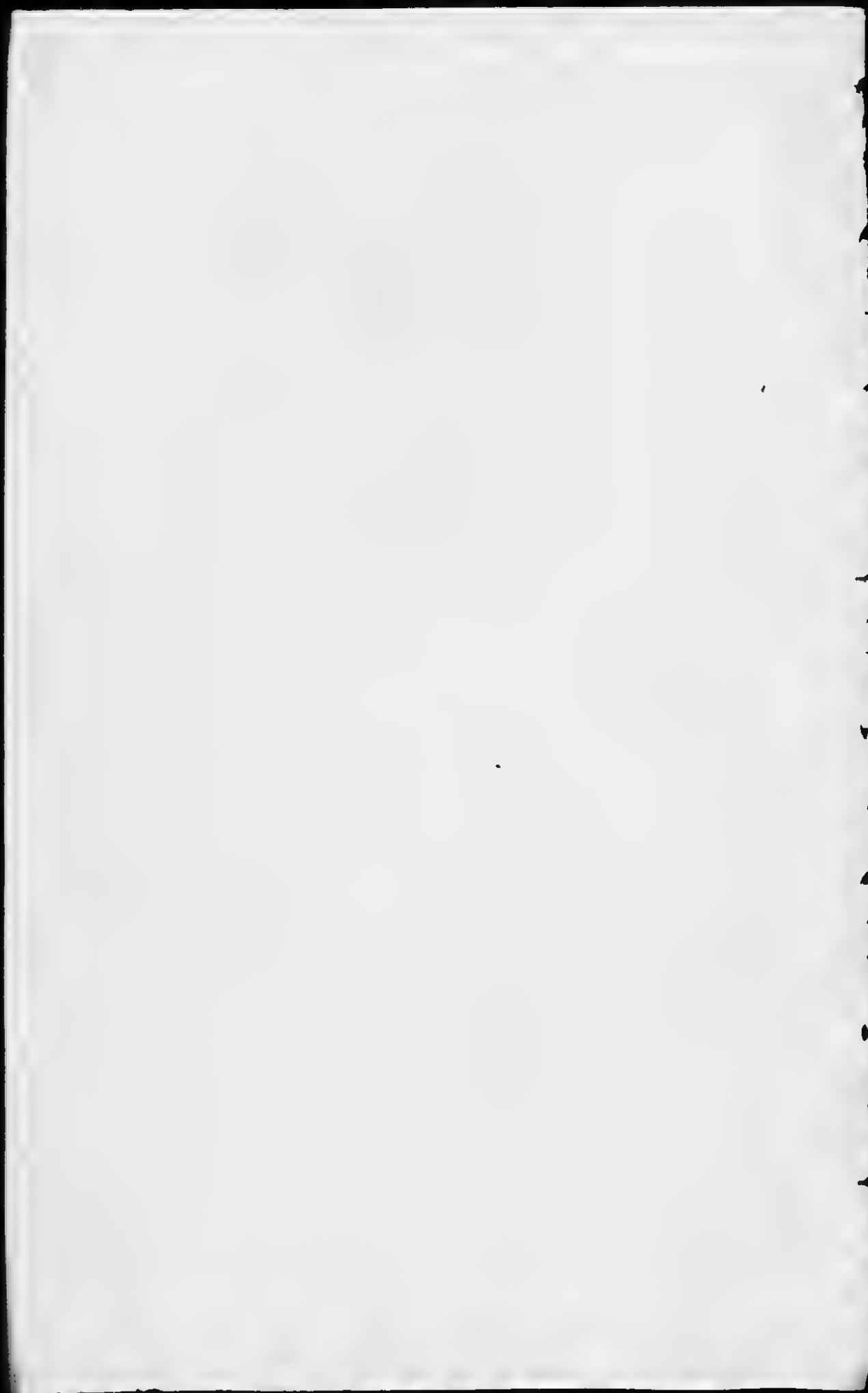
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Washington 5, D. C.**

Attorneys for **United States Court of Appeals**
South African Marine Corporation, Ltd., for the District of Columbia Circuit

Petitioner **FILED** **APR 15 1963**

Nathan J. [Signature]
CLERK



QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission's order of April 9, 1962, and its subsequent order of June 19, 1962, denying petitioner's motion for reconsideration of the earlier order should be held invalid on the ground that the Commission erroneously decided that the petitioner had violated Section 15 of the Shipping Act, 1916, without any evidence before it that the petitioner had carried out an agreement in violation of the Act.

2. Whether the said orders of the Commission should be held invalid on the ground that the alleged violations of Section 15 of the Shipping Act, 1916, were not those of the petitioner, but those of its agent.

3. Whether the said orders of the Commission should be held invalid on the ground that the Commission did not observe the proper evidentiary standards applicable to a proceeding which is the initial step in a penal proceeding.

4. Whether the said orders of the Commission should be held invalid on the ground that there was no proof in the proceedings before its Trial Examiner that the petitioner or its agent entered into any agreements in violation of Section 15 of the Shipping Act, 1916.

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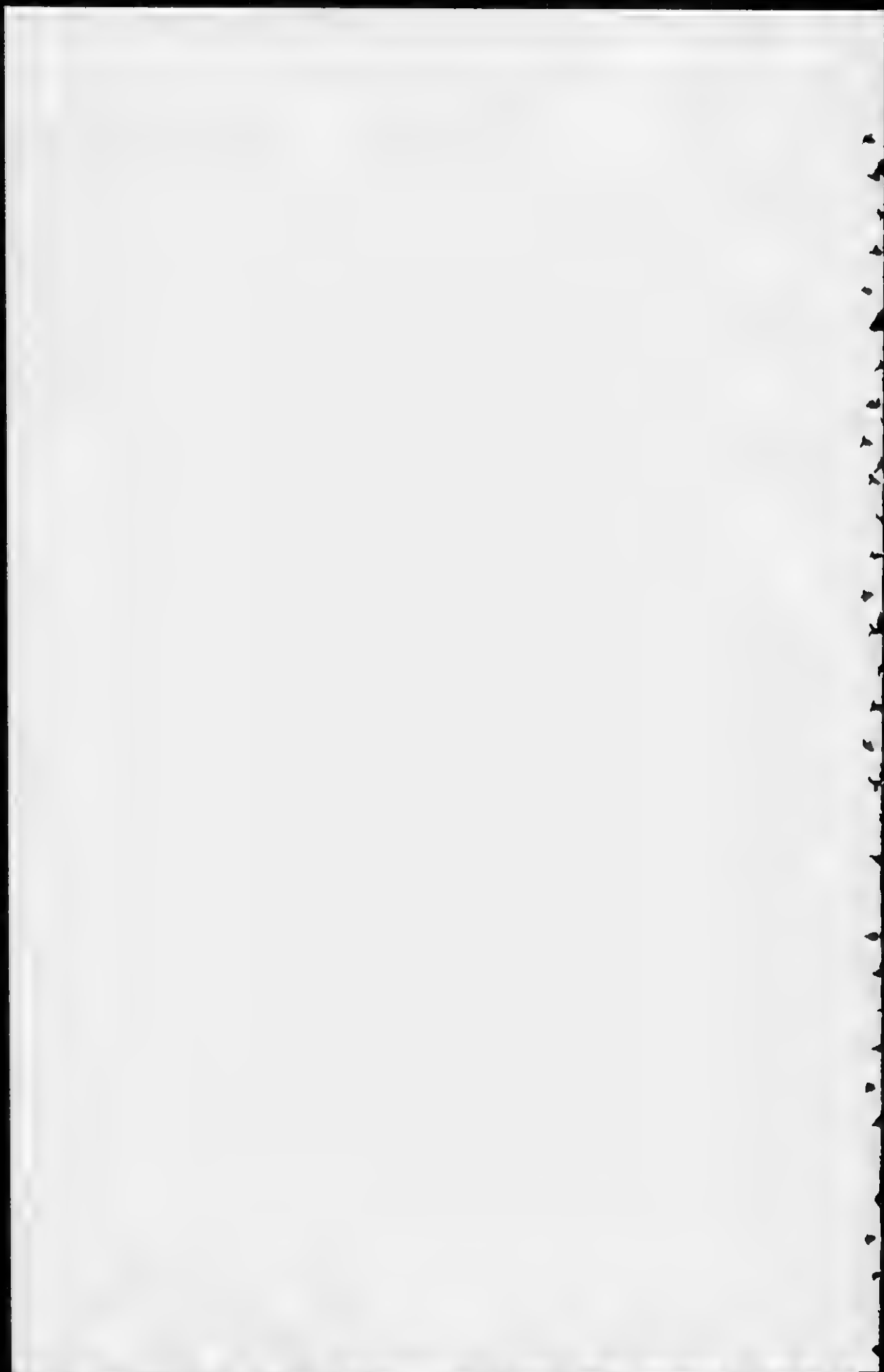
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*Cases or authorities chiefly relied upon are marked by asterisks.



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTH AFRICAN MARINE CORPORATION,
LTD.,

Petitioner,

—against—

UNITED STATES OF AMERICA and FEDERAL
MARITIME COMMISSION,

Respondents.

No. 17,222

**BRIEF FOR SOUTH AFRICAN MARINE
CORPORATION, LTD., PETITIONER**

JURISDICTIONAL STATEMENT

Petitioner is a corporation organized and existing under the laws of the Union of South Africa which operates a common carrier steamship service from United States ports to ports in South Africa. Petitioner is a party aggrieved by a final order of the Federal Maritime Commission dated April 9, 1962, and a final order of the Federal Maritime Commission dated June 19, 1962, which denied petitioner's motion for reconsideration of the order of April 9, 1962. Review of the orders of the Federal Maritime Commission is sought and the jurisdiction of this Court is based upon the provisions of Act of December 29, 1950, c. 1189, 64 Stat. 1129, U. S. C. A., Title 5, §§ 1031-1042. The venue in this Court is based upon Act of December 29, 1950, c. 1189, Section 3, 64 Stat. 1130, U. S. C. A., Title 5, § 1033.

The pleading showing the existence of jurisdiction is the Petition for Review filed with this Court on the 14th day of August, 1962. (J. A. 120)

STATEMENT OF CASE

This petition is filed by South African Marine Corporation, Ltd. (hereinafter called "Safmarine") to review a decision of the Federal Maritime Commission filed April 9, 1962, and the Commission's further order dated June 19, 1962, denying petitioner's motion for reargument.

The proceeding under review grew out of an investigation by the antitrust subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-Seventh Congress, colloquially called the Celler Committee, which subpoenaed witnesses and also documents in the files of the American steamship companies involved in the trade between South Africa and the U. S. Gulf and North Atlantic.

On January 7, 1960, the Federal Maritime Board (now the Federal Maritime Commission) instituted an investigation to determine whether petitioner and other steamship carriers in the trade had violated Section 15 of the Shipping Act (1916), 39 Stat. 733, Title 46, U. S. Code § 814.

THE STEAMSHIP COMPANIES INVOLVED

There were 7 steamship companies named in the charges, 3 American lines and 4 foreign lines. However, only 3 companies have brought their cases before this Court, namely Farrell Lines Inc., Nedlloyd Line and Safmarine.

Louis Dreyfus Lines terminated its service in February, 1957, so that a penalty suit against it is barred by the Statute of Limitations, Title 28, U. S. C. A. § 2462, and it was not named as a defendant in the penalty suit.

"Baron Iino" a Japanese line, was charged only with a violation as to tallow rates in June, 1959. However, no such violation was proved to exist so that all charges against Baron Iino were dismissed.

Of the 5 lines remaining, two American lines (Lykes Bros. Steamship Co., Inc. and Moore-McCormack Lines, Inc.) decided not to go forward with their petitions for review filed with this Court.

BACKGROUND OF THE SOUTH AFRICAN TRADE

Steamship companies have served the South African trade for many years.

Farrell Lines, an American subsidized line, was a pioneer. It was a member of a conference, together with several British lines, but after the end of World War II, the British lines discontinued their services, leaving Farrell as the sole member of the conference (J. A. 18).

Another American flag line, Seas Shipping Co., also subsidized but not a conference member, was in the same trade with Farrell. The assets of Seas Shipping were bought by Moore-McCormack on May 1, 1957, which continued the service under name of Robin Line (J. A. 15).

Lykes, a third American subsidized line, operated between the U. S. Gulf and South African ports. The services of Farrell and Robin were confined to the North Atlantic.

The services of the three lines now before this Court were as follows (Ex. 1, J. A. 18).

1. Farrell, as above stated, North Atlantic to South Africa and return.

2. Safmarine, Gulf and North Atlantic to South Africa. Safmarine, after 1954, did not operate as a common carrier on return (i. e. northbound) voyages (J. A. 101).

Safmarine was represented in the U. S. A. by an agent, States Marine Corp., an American Company (J. A. 168).

3. Nedlloyd operated as a common carrier only on voyages from South and East Africa to the U. S. A. (J. A. 101).

Safmarine and Nedlloyd were not competitive, one operating only *out-bound* and the other only *in-bound*.

THE FINDINGS OF THE EXAMINER AND THE COMMISSION

The Examiner, after hearing lengthy oral testimony and receiving many exhibits, held, on August 3, 1961, that there was no proof of any statutory violation on the part of any of the lines involved (J. A. 112).

The Examiner was, however, in part reversed by the Commission, which held that a violation as to tallow shipments, allegedly occurring in June, 1959, had not been proved, but that the lines in the trade (with the exception of Baron Iino) had been engaged in a continuous violation of Section 15 of the Shipping Act (1916) (46 U. S. Code 814) until September 10, 1958, when Safmarine became a member of Agreement No. 8054 (J. A. 12).

Agreement No. 8054, which was filed with, and approved by, the Federal Maritime Board (J. A. 113, 50) permitted the steamship lines who were parties thereto to enter into agreements with each other as to rates and other traffic matters. Farrell and Robin entered into this agreement on July 2, 1956, and from that date on agreements between Farrell and Robin as to rates, etc., did not require filing or approval. Lykes and Nedlloyd became parties to Agreement No. 8054 at later dates (J. A. 50). Safmarine, desirous of maintaining a competitive position, did not become a party to No. 8054 until September 10, 1958 (J. A. 50).

STATUTES AND RULES INVOLVED

The relevant parts of all statutes and rules involved are set out in the appendix.

STATEMENT OF POINTS

1. The Commission erred in holding that there was any violation of Section 15 (Shipping Act, 1916) by Safmarine because there was no proof that Safmarine had carried out any agreements offensive to Section 15.

2. The Commission erred in holding that there was a violation of Section 15 by Safmarine, because the violation, if any, was that of States Marine Corp., an agent of Safmarine, and Safmarine took no part therein.

3. The Commission erred in not observing the proper evidentiary standards applicable to a proceeding which is the initial step in a penal proceeding.

4. There was no proof that either Safmarine, or its agent, States Marine Corp., violated Section 15.

SUMMARY OF ARGUMENT

The decision of the Federal Maritime Commission that Safmarine violated the provisions of Section 15 of the Shipping Act (1916) is erroneous for four reasons: first, there was no proof put before the Commission that Safmarine had carried out any agreements with other lines. There was not even any attempt made to introduce proof before the Commission that Safmarine had carried out any agreements with which it was charged; second, the alleged violation of Section 15 was that of Safmarine's agent, States Marine Corp., not Safmarine and Safmarine was not involved; third, that the Commission did not observe

the evidentiary standards proper in this type of proceeding which was the initial step in a penal proceeding; fourth, there was no proof that either Safmarine or its agent violated Section 15.

I

There was no proof that Safmarine carried out any agreements which were required to be filed by Section 15 of the Shipping Act (1916).

At the hearings before the Examiner no attempt was made to introduce evidence that Safmarine carried out any agreements with other steamship lines. The Federal Maritime Commission admitted this in its decision of April 9, 1962, but held that such proof was unnecessary to show a violation of the Act which subjects the petitioner to a fine of \$1,000 per day.

The Commission's interpretation of the statute is entirely illogical and contrary to the settled rule that penal statutes must be strictly construed.

Section 15 reads: "* * * before approval or after disapproval it shall be unlawful to carry out * * * any such agreement * * *."

If two carriers make an agreement which they intend to have approved that is not unlawful. All agreements must be made before they can be approved.

If they intend to file it with the Commission, but then because it is of small importance do not carry it out, and do not file it, the Commission's interpretation would make these carriers liable for a \$1,000 per day penalty indefinitely. Congress had no such intent.

For 46 years the predecessors of the Federal Maritime Commission followed the interpretation that petitioner asserts is correct, i.e. that there is no violation of Section 15 until an agreement is carried out before approval or after disapproval by the Federal Maritime Commission.

In 1961 Congress amended the Shipping Act and changed Section 15 so as to provide that the failure to file agreements was unlawful as well as the carrying out of agreements. This amendment changed the prior law and under the rules of statutory construction indicated that the proper meaning of Section 15 before the amendment was that no violation took place until an unapproved agreement was carried out.

II

The violations asserted in this proceeding were not those of Safmarine but those of States Marine Corp., an agent.

It is undisputed that throughout the period under examination States Marine Corp. was Safmarine's agent in the U. S. A. and if any agreements in connection with freight rates were made with other lines they were made by States Marine Corp. A violation of law by the agent does not involve the principal. Safmarine should not have been held to have violated the Act without any evidence whatsoever that it has participated in any way.

III

The proceeding before the Federal Maritime Board was the initial step in a criminal or penal proceeding and like standards should have been observed in the trial. The Federal Maritime Commission should not have based its decision on hearsay, gossip and rumor.

Section 15 of the Shipping Act provides that violations shall be punishable by a penalty of \$1,000 per day for each day that the violation continues. The Federal Maritime Commission has no power to collect that fine as the statute

provides that it shall be collected by the United States in a civil action.

In proceedings under the Shipping Act, however, it has been clearly established that the Federal Maritime Commission has exclusive primary jurisdiction. Thus the Commission's determination that a violation has occurred is the necessary preliminary to the institution of a suit to recover penalties. The Commission's decision stigmatizes the petitioner as a lawbreaker and, accordingly, it is exceedingly important that the petitioner's treatment before the Commission be scrupulously analyzed.

In this proceeding the petitioner was found to be a lawbreaker on flimsy hearsay insinuation and rumor in inter-company telexes and carelessly concocted notes found in files of other carriers and neither sent nor received by Safmarine. There was no competent evidence to support the serious findings made by the Commission against Safmarine.

IV

There was no proof that either Safmarine or its Agent violated Section 15.

In the proceedings before the Hearing Examiner, a large volume of testimony was taken and a great number of exhibits were introduced but very little pertained to Safmarine, and what evidence there was indicated that Safmarine had made no agreements with any of the other lines.

Mr. W. H. McGrath, Vice President of States Marine Corp., testified that it was the policy of Safmarine not to make rate agreements with other lines (J. A. 174).

Safmarine's policy was to follow the rates charged by other lines. The fact that the same or similar rates were charged is not evidence of an agreement. Safmarine, a

foreign flag line, could not charge rates below the American lines without risking a violation of Section 19 of the Merchant Marine Act, 1920. To charge higher rates would be economic suicide.

Mr. McGrath's testimony, which is uncontradicted, shows clearly that Safmarine was not a party to any illegal agreements with other lines.

No correspondence produced from the files of Safmarine indicates any agreement to which Safmarine was a party.

Evidence that a representative of Safmarine who had no authority to fix rates attended some meetings where rates were discussed goes no farther than showing that Safmarine tried to keep fully informed on rate matters in order to carry out its own independent rate decisions.

The Commission's finding is also plainly illogical because if Safmarine had wished to enter into agreements as to rates with other carriers in the trade, it would have joined Agreement No. 8054 on July 2, 1956, when this agreement took effect as to Farrell and Robin Line (J. A. 50). The fact that it did not join Agreement No. 8054 until September 10, 1958, evidences the fact that Safmarine made no agreements before that date.

ARGUMENT

FIRST POINT

THERE WAS NO PROOF THAT SAFMARINE CARRIED OUT ANY AGREEMENTS WHICH WERE REQUIRED TO BE FILED BY SECTION 15 OF THE SHIPPING ACT (1916).

The decision of the Federal Maritime Commission admits the lack of proof of carrying out, but holds that this is immaterial on the ground that the mere making of an agreement, even if never carried out, incurs the statutory penalty of \$1,000 per day (J. A. 13, 58-61).

Section 15 is copied in Appendix.

Admittedly Section 15 is ambiguous. By a strained construction it could be given the meaning assigned to it by the Commission.

To give the statute such a construction would, however, be contrary to the settled rule that penal statutes must be strictly construed. *Yates v. United States*, 354 U. S. 298, 304. This rule has been applied in thousands of cases.

The absurdity of the Commission's construction is easily demonstrated.

Suppose two carriers make an agreement coming within Section 15. They intend to file it with the Commission, but, because it is of relatively small importance, overlook doing so, and they do not in fact carry it out. Do penalties at the rate of \$1,000 per day continue to pile up for an indefinite period?

We submit that the Congress never intended to penalize (at \$1,000 per day) a mere mental operation which could have no practical effect, could not harm anyone, and could not influence the commerce of the United States.

In fact, to construe the statute as did the Commission would render it unconstitutional because, although Congress may regulate foreign commerce, it has no power to regulate the thoughts of men and an uncarried out agreement is no more than a thought, and is not commerce.

On previous occasions the predecessor of the Federal Maritime Commission has ruled that a penalty is incurred only by taking action under an unfiled agreement.

The subject was discussed during the so-called Celler hearings. (Monopoly Problems in Regulated Industries) Hearings before the Anti-Trust Sub-Committee of the Committee on the Judiciary, House of Representatives, Part 1, Volume 1.

At a hearing which took place on October 13, 1959, at page 71, Mr. Clarence G. Morse, an eminent lawyer and at that time Chairman of the Federal Maritime Board and Maritime Administrator, testified, after quoting the fourth paragraph of Section 15, as follows:

"Now, what I am saying is that paragraph seems to place the impropriety on carrying out an agreement rather than the entering into the agreement. Mr. Meader. But as soon as——

Mr. Morse. Obviously, they have to enter into an agreement before there is an agreement. And there can't be any violation until there has been an agreement entered into.

Mr. Meader. Then the day when the thousand-dollars-a-day penalty commences to run is when some action has been taken under an agreement.

Mr. Morse. That has been our interpretation."

The Board's interpretation of Section 15, that there was no violation of Section 15 unless an unapproved agreement between carriers was carried out remained unchanged until 1962 when the present decision was filed. A merely mental operation did not entail a forfeiture of \$1,000 per day, even if the resulting agreement were not "immediately" filed.

This is a practical interpretation of the Statute continued from 1916 until 1962, a period of 46 years, and should not, therefore, now be departed from. *Pennell v. Philadelphia & Reading Railway*, 231 U. S. 675, 680; *Inland Waterways Corp. v. Young*, 309 U. S. 517, 524.

In *City of Portland v. Pacific Westbound Conference*, 4 F. M. B. 664, the Federal Maritime Board said at page 774:

"* * * It is only the *effectuation* of unapproved agreements between carriers or other persons subject to the Act which violates Section 15 of the Act * * *." (Emphasis supplied)

Also in *Agreements and Practices Pertaining to Limitation on Membership—Pacific Coast European Conference (Agreement 5200)*, 5 F. M. B. 39, the Board said at page 45:

“* * * Section 15 may only be violated by *effectuation* of an unapproved or disapproved agreement between carriers.” Citing *City of Portland* case, *supra*. (Emphasis supplied)

The Commission's retroactive change of its rulings punishes the petitioner for matters not deemed offensive to law until the Commission filed its decision in 1962, more than four years after the alleged violations had ceased. Such retroactive action is abhorrent to our system of law and at variance with the principles of the Administrative Procedure Act. *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F. 2d 141, 149, 150 (C. A. 9).

In *National Labor Board v. Mall Tool Co.*, 119 F. 2d 700, (C. A. 7), the National Labor Relations Board had ordered that certain employees who had been wrongfully discharged be paid back wages from March 15, 1937. The respondent asserted that the Board's order was unfair and improper inasmuch as no charges were filed until September of 1938.

In previous cases the National Labor Relations Board has not awarded back pay during the period in which charges had not been filed.

In holding that the National Labor Relations Board could not change its rule retroactively the Court said at page 702:

“Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures, outside the scope of the Board's pow-

ers. *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. . . . ; *Consolidated Edison co. v. N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599."

Back pay wages prior to September, 1938, were accordingly disallowed (page 704).

In the later case of *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F. 2d 141 (C. A. 9), the Atkinson Co. had entered into a contract with its employees in July, 1947, establishing a closed shop. At this time the National Labor Relations Board had refused to take jurisdiction of the building industry in which the respondent was engaged, and the closed shop agreement was legally valid.

One of the respondent's employees, a member of the union, defaulted in payment of the union dues and on the union's demand was discharged from the payroll. This resulted in a complaint being filed with the National Labor Relations Board and an order of the Board which declared the respondent guilty of an unfair labor practice.

The Court of Appeals denied enforcement of the National Labor Relations Board's order on the ground that it was retroactive and unfair and contrary to the principles of the Administrative Procedure Act.

At page 149 the Court said:

"We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board

would take cognizance, is manifest. It is the sort of thing our system of law abhors."

After referring to subsection (e) of Section 10 of the Administrative Procedure Act (see page 149) which requires the Court to set aside agency action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" the Court further said at page 150:

"The mood [of Congress] was one of disapproval of the application of agency policies to persons who acted without an opportunity to know that such policy would be applied to their conduct. The mood was one of disapproval of retroactive agency action."

At J. A. 61 the Commission further stated:

"We note, also, that Congress, apparently troubled by the same *obiter* which we mentioned above, added language to section 15 in its recent revision thereof (Public Law 87-346, *supra*) making it even more plain (if that is possible) that failure to file immediately is a violation."

The fact, as pointed out by the Commission, that Congress found it necessary to amend Section 814 (see Appendix *infra*) to provide that the mere making of an agreement without carrying it out would subject the carrier to a penalty (see 46 Code § 814 as amended October 3, 1961, 75 Stat. 763) clearly shows that, *in the absence of amendment*, the mere making of an agreement without performing it would not violate the statute as it read prior to October, 1961.

It is a rule of statutory construction that a significant change in an act by amendment indicates that the meaning of the act as originally enacted differs from the meaning of the amendment, for the amendment changes the law.

In *Brewster v. Gage*, 280 U. S. 327, it was necessary for the Supreme Court to construe Section 202 of the Rev-

enue Acts of 1918 and 1921 which provided that in case of property acquired by bequest or inheritance, the basis should be the fair market price of value of such property at the time of such acquisition. The question involved was whether the time of acquisition meant the date of the testator's death or the date of distribution. A subsequently enacted amendment clearly provided that the date to be taken was the date of distribution.

The Supreme Court held that this amendment confirmed the previous construction that the date of acquisition was the date of death because the amendment changed the law. The Supreme Court said, page 337:

"The deliberate selection of language so differing from that used in earlier Acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears."

In *U. S. v. Field*, 255 U. S. 257, the question was whether Section 202 of the Revenue Act of 1916 included property passing under a testamentary execution of a general power of appointment subsequent to the death of the testator. The statute had been amended to include such a power, and the Court said with reference to the amendment:

"Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment. See *Matter of Miller*, 110 N. Y. 216, 222; *Matter of Harbeck*, 161 N. Y. 211, 217-218; *United States v. Bashaw*, 50 Fed. Rep. 749, 754. * * *

The tax in question being unsupported by the taxing act, the Court of Claims was right in awarding reimbursement."

In *U. S. v. Carpenter*, 84 F. 2d 813 (C. C. A. 10), an erroneous refund of income tax was voluntarily made to

the taxpayer; demand for refund was not made until more than a year later. The Collector demanded interest from the date of payment, and a subsequently passed amendment to the Internal Revenue Act provided that interest should run against the taxpayer from the date of payment.

In holding that interest prior to the date of demand was not recoverable, the Court said:

"In *United States v. Bashaw* (C. C. A. 50 F. 749, 754, it was said:

"The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act.'"

See, also, *Barron Cooperative Creamery et al. v. Wickard*, Secretary of Agriculture, 140 F. 2d 485.

The order of the Federal Maritime Board which initiated this proceeding, shows that the Board considered it necessary to show that agreements, which required filing with the Board, had been carried out.

The Board's order of January 7, 1960, initiated an investigation to determine whether any of the named respondents "*** during the period of 1954 through 1959," "*** "had *carried out*" (emphasis supplied) agreements which required filing under Section 15 (J. A. 2).

Why was it necessary to determine whether the agreements referred to had been "carried out" if the statute was violated without carrying out? Was the purpose merely to waste the taxpayers' money by proving irrelevant facts?

The Commission's assertion that proof of "carrying out" was unnecessary is a clear indication that proof of "carrying out" was not made.

SECOND POINT

THE VIOLATIONS, IF ANY, WERE NOT THOSE OF SAFMARINE BUT OF STATES MARINE CORP., AN AGENT.

It is undisputed that throughout the period under examination States Marine Corp., an independent American company, was Safmarine's agent in the U. S. A. If any agreements were made, they were made by States Marine and not by Safmarine. There is no evidence that Safmarine took any part in making any agreements.

Section 15 of the Shipping Act resembles the anti-trust laws, and under the anti-trust laws a violation by the agent does not involve the principal.

United States v. Food & Grocery Bureau of So. Cal., 43 F. Supp. 966, at page 971.

See, too,

Nobile v. United States, 3 Cir. 1922, 284 F. 253, 255;

Paschen v. United States, 7 Cir., 1934, 70 F. 2d 491, 503.

THIRD POINT

THE PROCEEDING BEFORE THE FEDERAL MARITIME BOARD WAS AN INITIAL STEP IN A CRIMINAL OR PENAL PROCEEDING AND LIKE STANDARDS SHOULD HAVE BEEN OBSERVED IN THE TRIAL. THE FEDERAL MARTIME COMMISSION SHOULD NOT HAVE BASED ITS DECISION ON HEARSAY, GOSSIP AND RUMOR.

It is well settled that in cases like that now before this Court the principle of "primary jurisdiction" applies, and that no Court action will lie unless there has been a finding of statutory violation by the Commission.

Pan American World Airways, Inc. v. United States, decided January 14, 1963, 371 U. S. 296;

United States Navigation Co. v. Cunard S.S. Co., 284 U. S. 474;

Far East Conference v. United States, 342 U. S. 570.

The Commisison pointed out in its opinion that by its action alone it had no power to fine or otherwise punish the petitioner.

Nevertheless, the Commission's opinion stigmatizes the petitioner as a lawbreaker and is a necessary preliminary to the institution of suit to recover penalties in a ruinous amount (46 U. S. C. 814).

FOURTH POINT

THERE WAS NO PROOF THAT EITHER SAFMARINE, OR ITS AGENT VIOLATED SECTION 15.

To constitute a violation of Section 15 there must, initially, be proof of an agreement.

Mr. Meader, a member of the Celler investigating committee put the point very aptly, saying:

"But the kind of agreement that is referred to in Section 15, as I understand it, is a binding legal contract compelling parties to observe it."

(Monopoly Problems in Regulated Industries, Hearings before the Anti-Trust Subcommittee, Part I, Vol. II, page 1128.)

Mr. W. H. McGrath, Vice President of States Marine, who was in charge of Safmarine's rate matters stated that it was the policy of Safmarine not to make rate agree-

ments with other lines but to ascertain the rates being charged in the trade and then to follow those rates (J. A. 174, 175).

A foreign flag line, not a member of a Conference, is required to follow such a course by the provisions of Section 19 of the Merchant Marine Act, 1920. See Appendix to Brief.

If Safmarine had quoted rates below the American lines, such rates would have been unremunerative; furthermore, a rate war would have resulted. If rates above those of the American lines had been quoted, the Safmarine ships would have sailed empty.

The fact that most or even all of the petitioners at times quoted the same or similar rates is not evidence of an agreement between them nor is such consonance in rates forbidden by Section 15 of the Shipping Act.

United States v. Standard Oil Company, 47 F. 2d 288, involved a proposed merger between Vacuum Oil Company and Standard Oil Company of New York (referred to in the opinion as "Socony") which the United States sought to prevent as a conspiracy in undue restraint of trade.

In dismissing the petition of the United States, the Court, in commenting upon the fact that other oil companies quoted the same prices as Socony said at page 316:

"* * * if the major companies follow the Socony prices in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every community in the country by retail competitors in all lines." (Citing five decisions of the Supreme Court.)

The principle stated in the above quotation is in accord with the testimony of the witnesses in these proceedings, to the effect that one line had to follow the rate of a competitor, and it is obvious, therefore, that similarity or identity in rates is not evidence of any prior agreement.

Prior to June 1, 1959, States Marine Corp. was the agent of Safmarine in the U. S. A. and the testimony is uncontradicted that the fixing of rates was under the control of Mr. W. H. McGrath, Vice President of States Marine, who testified (J. A. 174, 175):

“Q During the time you had duties in relationship with the agency agreements with South African Marine, was that carrier a member of any conferences in the South African-United States trade?

A It was SAFMarine's policy not to join either the United States Gulf or United States Atlantic-South African Conference, or have any agreement with any other lines.

Q Can you give me any reason for that policy?

A SAFMarine, as a matter of policy, followed conference rates, Atlantic and Gulf, to the extent that they could, appreciating the fact that they loaded in both areas, and therefore, if there was ever any discrepancy or disagreement between the Atlantic and Gulf conferences, they were in the position they had to go one way or the other, but they did as a matter of policy, follow conference rates, and they notified shippers to that effect.

They were interested in rate stability. They were content to operate within a rate structure that was satisfactory to the American lines. They did feel, however, that they wanted to maintain their own freedom of action in the best interest of the shippers, the receivers, the South African government and SAFMarine.”

And in discussing the manner in which Safmarine rates might be fixed and the positions of the other steamship lines

in the trade, Mr. McGrath further testified (J. A. 176, 177):

"A * * * We each had an individual position we wanted to maintain.

Q And upon arriving at such an individual position, you would notify the other lines; is that correct? A. I would say that we had told them that we had no objection to telling them what our position, what our intended position would be. I don't say that we told them in every case.

Q Ordinarily would you have given them 48 hours notice?

A I never remember giving any line 48 hours notice of a rate change."

Mr. McGrath specifically denied that Safmarine had ever agreed to give any other line advance notice of a change in rates (J. A. 172), and he further pointed out that by the filing of the Safmarine tariffs alone some advance notice was necessarily given since a rate increase could not be made immediately effective (J. A. 177).

The record contains no testimony contrary to the above. Mr. McGrath was a reliable and experienced witness, he was believed by the Examiner, and the Commission could not presume that he testified falsely, in the absence of any contradiction.

The Commission, in its report, stated that the correspondence produced from the files of each line showed a violation of Section 15.

The only letters or other documents produced from the files of States Marine-Safmarine did not show any agreement.

In support of its conclusion the Commission cites Exhibits 116, 117 and 118, three letters written by Mr. McGrath, Vice President of States Marine, not an employee of Safmarine. (J. A. 286, 288, 290).

Exhibit 116 (J. A. 286) is a letter dated April 6, 1954, addressed to Mr. H. Rees, South African Marine Corporation, Ltd., Cape Town, in which Mr. McGrath stated that the traffic manager of Socony had advised him that the rates on lube oil from the United States were not competitive with the rates from the United Kingdom. Apparently, the Socony traffic manager had made the same statement to Farrell and Robin. Mr. McGrath's letter states that no reduction in the Safmarine rate would be made, despite the fact that Dreyfus was quoting a rate \$5.00 lower than Safmarine. It also appears that Safmarine notified Farrell and Robin that Safmarine did not intend to reduce its rate. This letter does not show that there was any agreement between any of the steamship lines.

At J. A. 40 the Commission quotes a letter written by Mr. McGrath on November 6, 1957, (Ex. 118), in which he stated that he was going to have lunch with a shipper of ores and fertilizers, together with Robin and Farrell, "in the hope that we can all agree with him on an equitable freight rate on his business * * *." (J. A. 40).

However, no agreement was ever reached (J. A. 176).

If an agreement had been reached between the shipper and the three lines referred to as to a rate, it could have been filed with the Federal Maritime Board, and the testimony does not show that such an agreement, if it had been made, would not have been filed. There was also, of course, nothing to prevent Safmarine becoming a party to Agreement No. 8054, which it joined a few months later. This letter entirely fails to prove any agreement contrary to Section 15 on the part of Safmarine. The reliance of the Commission on this letter shows either fundamental lack of knowledge of the law or bias against the petitioner.

At J. A. 42 the Commission makes brief reference to Exhibit 117, J. A. 288. Mr. McGrath's testimony at J. A. 171-174 shows that there was no violation on the part of

Safmarine. Mr. McGrath was referring to agreements between other carriers to which Safmarine was not a party.

The finding of the Commission that Safmarine violated Section 15 is based on the premise that, since other carriers in the trade, in particular Farrell and Robin, had entered into agreements as to rates with each other, therefore, Safmarine must also have entered into an agreement.

This is an obvious *non-sequitur*.

There is also evidence that on various occasions so-called Conference meetings were held. At some of these a subordinate employee of States Marine was present (J. A. 33).

None of these meetings were attended by Mr. McGrath, and he alone had the authority to make agreements as to rate matters (J. A. 185). These meetings were attended by an employee of States Marine merely to ascertain the action intended to be taken by the powerful American lines in the trade. The last of these meetings was held on March 26, 1958 (J. A. 32), after which Conference meetings were discontinued because the various lines joined Agreement No. 8054.

The Commission's finding that Safmarine, through its agent, entered into agreements with other lines as to rates, but did not file such agreements, is entirely illogical.

If Safmarine had wanted to enter into agreements as to rates with other lines in the trade, nothing would have been simpler than to become a member of Agreement No. 8054 from its inception.

It was just because Safmarine did not want to enter into agreements with other lines that it did not join No. 8054 till late in the day, i.e. September 10, 1958.

Safmarine wished to preserve freedom of action as to rates and maintain its competitive position as long as it could.

By September 10, 1958, however, all the other lines in the trade (except Baron Iino) had become parties to Agree-

ment No. 8054, and Safmarine decided that it should do likewise.

The Commission's opinion recites testimony by several witnesses to the effect that States Marine (Safmarine's agent) concurred in certain actions relating to rates taken by other of the respondents. Obviously, the witnesses who so testified mean that Safmarine was following its usual policy of quoting the same or similar rates as those quoted by other lines in the outward trade, U. S. A.-South Africa.

At J. A. 29 the Commission refers to testimony to the effect that Safmarine had "concurred" in certain rates. This obviously meant no more than that Safmarine was quoting the same rate as did other lines in the trade. This was in accordance with the practice of States Marine, the agent of Safmarine, to avoid upsetting the rate schedule.

The attitude of States Marine, Safmarine's agent, is shown in the teletype sent by Mr. Cocke on December 23, 1954 (J. A. 36). In this teletype Mr. Cocke after complaining of a rate reduction by one of the lines, continued as follows:

"SOME SORT OF AGRMNT BETWEEN ALL THE LINES INVOLVED MUST B FILED WITH THE FMB AND AM WONDERING HOW STATES MARINE [AGENT OF SAFMARINE] WL VIEW THIS AS THEY HAVE STEADFASTLY NOT BN WLG TO CONSDR ANY CONFRNC SETUP SO TO SPEAK."

In J. A. 38, 39 the Commission quotes part of the following cable sent by Mr. McGuire to the London representative of the Robin Line:

"REFERENCE CONVERSATION ASPHALT BITUMEN RATES LYKES FARRELL SAFMARINE DREYFUS OURSELVES

HAVE AGREED FOLLOWING NEW
RATES * * *

The Commission deleted the next two words in this cable which were "FROM TRINDAD." Trinidad is a port in the British West Indies, outside the U. S. A., and rates between two foreign ports are not subject to Section 15 of the Shipping Act.

Also, at J. A. 39, the Commission quotes a memorandum prepared by Mr. McGuire of the Robin Line for his file, in which he stated that at the request of Mr. Farrell (of Farrell Lines) and Mr. Mercer (of States Marine, Safmarine's agent) he telephoned Mr. Cocke as to certain rate increases. However, the memorandum does not show an agreement.

At J. A. 39, 40 the Commission refers to meetings at the office of the Conference in June of 1956, at which meeting were representatives of various lines in the trade including Mr. F. DeMarco, a subordinate employee of States Marine. At this conference a proposed new rate schedule was prepared, but, as shown in the decision of the Commission, this rate schedule was not adopted by the various lines.

None of the testimony referred to by the Commission in its opinion in fact shows that any agreement was ever entered into by States Marine, Safmarine's agent, or by Safmarine itself. The most that Safmarine did was to keep informed of the rates prevalent in the trade and try not to deviate too widely therefrom.

It will be obvious indeed to the Court that the attitude of the Commission in the matter is entirely based on a technicality, because as soon as Safmarine and the other carriers had become members of Agreement No. 8054 (J. A. 50), the Commission admits that there was no ground of complaint. Safmarine did not want to tie its hands, and wished

to preserve its competitive position, which is certainly in accord with our business policy. Merely because Safmarine did not wish to give up its liberty to compete, it has now been branded as a lawbreaker by the Commission.

The fact that the Commission's decision was arbitrary and capricious is shown by their criticism of respondents because their counsel asked for some particularization of the charges made against them, and because counsel interposed objections to evidence which they considered incompetent.

1. This proceeding was begun by an order (J. A. 1), in the broadest terms, to determine whether any of the six respondents, excluding Baron Iino Line, had "carried out" agreements under Section 15 of the Shipping Act, 1916, affecting trade between the United States and South and East Africa, which were not approved, although they required approval. Then by amended orders the proceeding was broadened, and in particular to include the Baron Iino Line, as to transactions in 1958 and 1959.

The proceeding, therefore, covered many matters which had taken place from 1954 through 1959, and this petitioner, therefore, believed that it was entitled to more particulars of the charges against it than was given in these broadly phrased orders.

As pointed out *supra*, these orders initiated a penal proceeding which might lead to the respondents (including the present petitioner) being fined many thousands of dollars. Under the Sixth Amendment to the Constitution of the United States an accused must be "informed of the nature and cause of the accusation." Such a provision should be applicable when the Federal Maritime Commission enters an order to ascertain if a party subject to its jurisdiction has violated the law.

In prosecutions under the Sherman Anti-Trust Act, bills of particulars are granted; *U. S. v. Allied Chemical & Dye Corp.*, 42 F. Supp. 425; and petitioner in a proceeding like that now before this Court is entitled to a like right.

Some particularization of the charges is of assistance, not only to the petitioners but also to those seeking to prove that violations have occurred.

The argument of the Commission is that the petitioners must have known what they did and whether or not their actions involved a violation; consequently, there should be no need of a bill of particulars or any similar particularization.

Such an argument is obviously fallacious; the petitioners are presumed not to have violated the law, and what they did may seem to them innocent; they are entitled to know in what respects the prosecutor alleges they have violated the statute; *Lynch v. U. S.*, 10 F. 2d 947, 949; *U. S. v. Allied Chemical, supra*, at page 428.

If the purpose of this proceeding were merely to gather information, it might well be that no particularization would be required. However, that was not the case; it was the obvious intent to obtain a finding of statutory violation, and Public Counsel, who represented the Commission, did their utmost to obtain such a finding.

2. The petitioners were also criticized and the merits of the case prejudiced by the Commission's finding that their counsel asked that the proceedings be conducted in accordance with well settled and recognized rules of evidence (J. A. 46).

Apparently, the Commission rules that, if as an act of grace the petitioners may be represented by counsel, counsel must stand mute, no matter how absurdly and unfairly the proceedings are conducted.

LAST POINT

THE FEDERAL MARITIME COMMISSION SHOULD BE DIRECTED TO REVERSE AND ANNUL ITS DECISION FINDING THAT PETITIONER, SOUTH AFRICAN MARINE CORPORATION, LTD., VIOLATED SECTION 15 OF THE SHIPPING ACT, 1916 (46 U. S. C. 814) WITH SUCH OTHER OR FURTHER RELIEF TO PETITIONER AS TO THE COURT MAY SEEM JUST.

Respectfully submitted,

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Dated: New York, N. Y., February 4, 1963.

APPENDIX**RELEVANT PORTIONS OF STATUTES
AND RULES INVOLVED****SHIPPING ACT, 1916**

Section 15, 39 Stat. 733, as amended,
U. S. C. A. Title 46, § 814.

§ 814. *Contracts between carriers filed with Board*

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competi-

tors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action. Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F. R. 3178, 64 Stat. 1274, 1277.

MERCHANT MARINE ACT, 1920

Section 19, 41 Stat. 995, as amended,
U. S. C. A. Title 46, § 876.

"876. Power of Secretary and Board to make rules and regulation.

(1) The Secretary of Commerce is authorized and directed in aid of the accomplishment of the purposes of this Act:

* * * *

(b) To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country; * * *

CERTIFICATE

I hereby certify that on this 5th day of February, 1963, I served a copy of the foregoing Brief For Petitioner South African Marine Corporation, Ltd. upon all parties to these proceedings by placing a copy thereof in the U. S. mail, first class, postage prepaid, properly addressed to the following counsel for said parties:

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I further certify that a copy of the foregoing type-written brief has been placed in the hands of the printer and that no changes in said brief to be filed in printed form will be made, except for minor changes or corrections.

s/ RUSSELL B. PACE, JR.
Russell B. Pace, Jr.

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS ^{United States Court of Appeals}
FOR THE DISTRICT OF COLUMBIA CIRCUIT ^{for the District of Columbia Circuit}

No. 17,218

FILED APR 17 1963

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND"
and KONINELIKE ROTTERDAMSCH LLOYD, N.V. *Nathan J. Paulson* CLERK
as participants in a joint steamship service
under the trade name "NEDLLOYD LINE", Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,
Respondents.

No. 17,222

SOUTH AFRICAN MARINE CORPORATION LTD., Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,
Respondents.

No. 17,224

FARRELL LINES INCORPORATED, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF ORDER OF THE
FEDERAL MARITIME COMMISSION

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Federal Maritime Commission

QUESTIONS PRESENTED

1. Does the Commission's finding that petitioners violated section 15 of the Shipping Act have sufficient basis in the evidence and law?
2. If petitioners did not "carry out" a rate-fixing agreement in violation of section 15, did they violate the section by failing to file such an agreement?
3. Did the Commission commit procedural and evidentiary errors, or deny petitioners "due process"?
4. Are petitioners "parties aggrieved by a final order" reviewable by this Court under the Review Act of 1950 (5 U.S.C. 1031)?

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COUNTERSTATEMENT OF THE CASE

These are three consolidated petitions to review a report of the Federal Maritime Commission of April 9, 1962, in which six common carriers by water (three American flag and three foreign flag) were found to have violated section 15 of the Shipping Act of 1916 (46 U.S.C. §814),^{1/} during the years 1954-1958. (Unapproved Section 15 Agreements--South African Trade, FMC Docket 882) (JA 12-67). Since the Commission found that the carriers were no longer acting contrary to section 15, it issued no order against them and discontinued the proceeding (Rep. p. 46; JA 67-68). Thereafter, petitions for reopening and reconsideration of the proceeding were filed by the several carriers, and these were denied by the Commission on June 19, 1962, by order which stated in relevant part (JA 71-72):

"There is nothing materially new in these allegations and the supporting arguments advanced by the respondents. They were all expressly or necessarily considered in our report of April 9, 1962. In that report we took great pains to explain the basis of our decision in detail. We rather copiously reviewed the evidence, the nature of the proceeding, and the applicable legal principles, citing references to the pertinent authorities. A reexamination of our findings and conclusions in light of the arguments and cases relied on in the several petitions of respondents only reaffirms the correctness of the April 9 report.

"Some of the respondents claim they are unable to determine what their future conduct should be, despite the extraordinary lengths to which our report goes in spelling this out. Instead of attacking the report, we believe the respondents would be better advised to give it more objective consideration to the end that they may hereafter avoid any reoccurrence of proscribed section 15 activity. Especially is this so when it is recalled that respondents

^{1/} Sec. 15 as it stood at all times material to this controversy and before its amendment in 1961 by Public Law 87-346, 75 Stat. 763-4, is set forth as Appendix A to this brief.

have been subjected to no order by the Commission in this matter. As regards referral of the case to the Department of Justice, referral as our decision made plain is routinely made where past violations of the law are found and the fact that this is done neither alters the character of, nor is it relevant to, the proceedings before this Commission. The separate question of imposing sanctions for such violations rests within the province of the Attorney General and the courts."

Five of the six carriers found to have violated section 15 filed petitions in this Court for review of the Commission's report.^{2/} On September 26, 1962 the Commission and the United States filed a motion to dismiss the five petitions asserting that this Court should not review the report because petitioners are not parties "aggrieved by a final order" judicially reviewable under the Review Act of 1950 (5 U.S.C. 1031). Two of the petitioners, Moore-McCormack Lines, Inc. (No. 17,215) and Lykes Bros. Steamship Co., Inc. (No. 17,223) consented to the dismissal of their petitions for review, a civil penalty suit under section 15 having been brought by the United States in the Southern District of New York.^{3/} Oral argument was heard by this Court on December 13, 1962 and on December 17, 1962, the petitions of Mormac and Lykes were dismissed and the motion to

^{2/} The sixth carrier, Louis Dreyfus Lines (hereinafter "Dreyfus"), a foreign flag operator, did not file a petition for review, presumably because it had withdrawn from the trade involved in February 1957.

^{3/} The civil penalty suit was filed by the United States Attorney during September 1962 in the U. S. District Court for the Southern District of New York (62 Civ. 3208) pursuant to the provisions of section 15, against five of the six carriers involved. Since the statute of limitations had run in the case of Dreyfus, that carrier was omitted from the suit.

dismiss was denied as to the other carriers, without prejudice to its renewal at the time of hearing on the merits. The three remaining petitions were consolidated for the purpose of filing briefs, joint appendix, and for hearing.^{4/}

The Commission's report was the culmination of an investigation initiated by its predecessor, the Federal Maritime Board,^{5/} on the Board's own motion in January 1960 for the purpose of determining whether any of the carriers had entered into and effectuated without approval under section 15 during the period 1954 through 1959 any agreements affecting the trade between the United States and South and East Africa requiring such approval (JA 1-11).

Section 15 states "That every common carrier by water . . . shall file immediately with the board a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier . . . , or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing, or destroying competition, . . . or in any manner providing for an exclusive, preferential or cooperative working arrangement." The section further provides

^{4/} No. 17,218 - N.V. Stoomvaart Maatschappij "Nederland" and Koninklijke Rotterdamsche Lloyd, N.V. (hereinafter "Nedlloyd"), No. 17,222 - South African Marine Corp., Ltd. (hereinafter "Safmarine") and No. 17,224 - Farrell Lines, Incorporated (hereinafter "Farrell").

^{5/} By Reorganization Plan No. 7 of 1961, H. Doc. 187, 87th Cong., 1st sess., the Federal Maritime Board was abolished on August 12, 1961, and was succeeded by the Commission as the agency administering the Shipping Act, 1916.

that the term "agreement" shall include "understandings, conferences, and other arrangements" and that agreements "shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement." Violation of "any provision of this section" subjects the offender to "a penalty of \$1,000 for each day such violation continues" (changed to "not more than \$1,000 for each day" by Public Law 87-346) to be recovered by the United States in a civil action. Approved agreements are exempted from the antitrust laws. (See Appendix A.)

Hearings in the case were held for six days in August and October 1960. During the hearings Public Counsel^{6/} tendered some 160 documents subpoenaed from the carriers' files. These were identified or otherwise authenticated and in many instances were the subject of direct testimony by the witnesses in the case, all of whom were officers or agents of the carriers. At the carriers' request, the Examiner deferred their cross-examination until completion of Public Counsel's presentation, and also deferred ruling on the admissibility of the documents. In accordance with this procedure, the carriers subsequently cross-examined their own officers and agents, and presented additional exhibits and testimony in connection therewith, following which they elected to offer

^{6/} Public Counsel (currently called "Hearing Counsel") is a Commission employee, divorced from the decisional process, who is automatically a party to an agency-ordered investigation and is responsible for assembling and presenting evidence pertinent thereto.

no further evidence. An additional two days of hearings were then held solely to consider the admissibility of the documentary exhibits. Of the 1142 which Public Counsel offered in evidence, seriatim as required by the Examiner, the Examiner sustained objections of the carriers to 113 and admitted only 29.

In his recommended decision, issued in August 1961, the Examiner concluded that the carriers had not entered into or carried out any agreement in violation of section 15 during the period involved. To this Public Counsel filed exceptions and the carriers replied objecting to the exceptions. Following an exhaustive review of the entire record, the Commission reversed the Examiner in a 46-page report which painstakingly set forth the nature and bases of its action. The Commission stated that it had no choice but to reverse in view of the "substantial errors" that had been committed and its responsibilities for insuring correctness in the ultimate decision. (Rep. p. 4; JA 17-18). In connection with its decision, the Commission received in evidence the 113 rejected exhibits from the carriers' files, which had been made the subject of an offer of proof.

In respect of violations of section 15, the Commission found (Rep. pp. 5-6, 30-35; JA 19-20, 48-54) that during the years 1954-58 inclusive the carriers participated in an agreement or cooperative working arrangement for the exchange of rate information and the fixing of transportation rates and related matters in the trade between South and East Africa and Atlantic and Gulf ports of the United States, which arrangement often resulted in

comprised all of the common carriers in the trade) had identical tariff rates on most items; that the Examiner himself so found; that a section 15 agreement, No. 8054, to which only Farrell and Robin were parties, was filed with the Board in March 1956 and approved by it July 2, 1956; that over the next two-plus years Mormac (which in May 1957 acquired the property and personnel of Robin Line), Lykes, Nedlloyd and Safmarine became parties to this agreement but meanwhile the rate-fixing arrangement was continued among all the carriers whether or not signatory to 8054; and that the lines had carried out the arrangement in specified ways.

Finally, the Commission found and concluded that the carriers neither filed nor secured approval of their cooperative working arrangement, nor any of their numerous subsidiary rate agreements and understandings, all of which they carried out; that Agreement 8054, authorizing the parties thereto to discuss and agree on rates and related tariff matters and requiring the parties to give each other at least 48 hours' notice prior to altering a rate, simply formalized essentially the same unfiled and unsanctioned cooperative working arrangement under which the carriers had operated throughout the period involved; that the agreement was not a true and complete copy or memorandum of the arrangement since it failed to disclose all of the participants therein until September 10, 1958; and that in these several respects the carriers had violated section 15 of the Shipping Act, 1916. The carriers had engaged, said the Commission, in precisely the type of unapproved and unauthorized anticompetitive arrangement which section 15 condemns (Rep. pp. 35-38; JA 54-58).

In respect of evidence, the Commission pointed out that all of it consisted of testimony by the carriers' officers and agents and authentic, contemporaneous documents from the carriers' files (including the 113 rejected exhibits) relating to the very matter under investigation. It said the carriers' numerous objections to this evidence, relying on hearsay and other strict evidentiary rules, were not well founded because under the Administrative Procedure Act and the Commission's rules the evidence was reliable, relevant and probative and thus clearly admissible. The Examiner erred, the Commission held, in accepting the carriers' contention that the proceeding was a penal trial and their related theories on admissibility of the evidence, it being an administrative investigation in pursuance of the Commission's regulatory functions. As a result of this, said the Commission, there was undue squabbling over technical rules of evidence and ultimately a rejection of some 80 percent of the exhibits offered by Public Counsel. The Commission stated that its receipt of these exhibits could not prejudice the carriers since they had been treated for all practical purposes as part of the proceeding before the Examiner excluded them at the end of the hearings. They were the subject of both direct and cross testimony and portions of some were read into the record and concurred in by witnesses as part of their testimony.^{7/} (Rep. pp. 6-13, 28-30; JA 20-28, 46-48).

^{7/} The Commission also examined other exhibits which had been used during the hearings and were physically part of the record but were not in the final analysis offered into evidence as exhibits. These had been tendered originally both by Public Counsel and the carriers. The Commission stated that the contents of these exhibits could not affect its conclusion (Rep. p. 30: JA 48).

In 22 numbered paragraphs of its report the Commission set out and discussed examples of the admitted and excluded exhibits in the case, with extracts of the testimony relating thereto. It said it could discern no material distinction between the quality and competency of the evidence the Examiner properly received and that which he rejected, and also pointed to the "interrelated, complementary and corroborative" character of all the exhibits and their "cumulative delineation of respondents' common course of unapproved activity" (Rep. pp. 13-30, 33; JA 28-48, 51-52). Even the limited proof the Examiner admitted, the Commission stated, "indicates clearly that the respondents had a meeting of the minds for a cooperative rate arrangement and when the entire record is brought into focus the picture of it is most convincing" (Rep. p. 33; JA 51-52).

The Commission further held that the carriers had received full notice of the matters under investigation and ample opportunity to prepare their position (Rep. pp. 8-9, 29-30; JA 22-23, 47-48). It rejected as irrelevant to the question of section 15 violations, and in any event without merit, the claims which were urged in particular by the American-flag carriers to the effect that their subsidy relations with the Commission's predecessors amounted to approval of their rate-fixing activities hereinabove described (Rep. pp. 6, 43-46; JA 19-20, 63-67). Certain other violations involving both sections 15 and 14, Second of the Shipping Act, which the Board had also ordered investigated in this proceeding, were found by the Commission not to have been established (Rep. pp. 41-43; JA 61-63).

SUMMARY OF ARGUMENT

I. The record here makes plain that petitioners and the other carriers in the U.S./South Africa trade during 1954-58 had an unfiled and unapproved agreement or cooperative working arrangement under which they fixed transportation rates, contrary to section 15 of the Shipping Act. No serious attempt is made to deny that rates were discussed and rate information exchanged, following which the carriers generally charged and quoted the same rates. Petitioners' denial of an agreement is based on the lack of a formal or "binding legal contract" among the carriers. Such an interpretation does violence to section 15, which embraces every type of agreement, including an informal cooperative working arrangement, to fix rates or control, regulate, prevent or destroy competition. The scope of the section is clear from its express language as well as its history and no exemptions from its filing and approval requirements are provided for. The courts, the Commission and its predecessors have all so interpreted section 15.

Petitioners' attempt to show that they were acting independently has no merit. The proof of "independence" which petitioners cite in fact proves the existence of their unauthorized anticompetitive arrangement. The same so-called "independence" was provided for in Agreement 8054, to which petitioners and the other lines ultimately became parties, and 8054 is clearly an agreement covered by section 15. (Appendix B.)

All of the evidence establishing the agreement was from the files of petitioners and their associated carriers and from testimony by their

personnel. It is nonsense for petitioners' to argue that such evidence only reflects loose talk or the exchange of rate information. It specifically shows concerted rate-fixing and a cooperative working arrangement under which petitioners and the other carriers set, quoted, and carried cargo at, agreed rates, with the result that competition in the trade was substantially eliminated.

In similar but less conspicuous cases involving such arrangements, section 15 has been held violated and the Commission was correct in so holding here. The Commission's decision is supported by evidence, reasons and law, and it should be affirmed by this Court. Anchor Line Ltd., et al. v. Federal Maritime Commission, 112 U.S. App. D.C. 40, 299 F. 2d 124 (1962), cert. den. 370 U.S. 922 (1962).

I(A)(1). Farrell's special argument that its activities were directed or sanctioned by Maritime by reason of Farrell's status as a subsidized American carrier, was fully considered by the Commission and rejected as without merit. Whatever "cooperation" the subsidy program may have called for between Farrell and the Robin Line, another subsidized carrier operating on the same route, the record makes clear that Farrell was not excused from compliance with the regulatory requirements of section 15. Subsidy enables American lines to compete against foreign-flag lines. Here Farrell was acting in concert with the foreign-flag lines and all other carriers in the trade to eliminate competition, which arrangement was not revealed to, much less approved or directed by, Maritime.

I(A)(2). There is nothing to be said for Safmarine's and Nedlloyd's contention that they are not responsible for the acts of their agents in the United States. Assuming it was the principals' policy not to enter agreements, they obviously had no policy against the informal rate-fixing arrangement revealed by this record. The agents were clothed with and exercised rate authority, functioned in the name of their principals, reported their actions to their principals including particularly their concerted rate-setting with the other lines participating in the arrangement, and the principals ratified and received the benefits of the arrangement. Moreover, while this is not a penalty proceeding, even if it were the liability under section 15 is civil and a principal is responsible for the acts of his agent involving civil liability.

II. The Court need not reach the Commission's finding that petitioners also violated section 15 by failing to file their agreement. Petitioners argued this issue to the Commission and the Commission, although it did not have to, ruled on the issue simply because petitioners were advancing another basic misinterpretation of section 15 which it felt should not go unanswered in the interest of proper Shipping Act administration. Contrary to petitioners' assertions, the ruling was not made to supply what was otherwise lacking, nor would petitioners have been aided had the ruling not been made.

The record everywhere shows and the Commission found that petitioners and the other lines "carried out" their unauthorized arrangement to control, prevent or destroy competition. Among other things, they fixed rates in concert, quoted the agreed rates and booked cargo on the

basis thereof, and acted together in denying shipper requests for rate changes. If the Court nevertheless wishes to consider whether failure to file is itself a violation of section 15, it should affirm the Commission since both the language and purpose of the section clearly demonstrate that failure to file an anticompetitive agreement is and was intended to be a separate offense. The 1961 amendment to the Shipping Act (Public Law 87-346, 75 Stat. 762) did not create a new requirement in this respect.

III. The Commission committed no procedural or evidentiary errors. Contrary to petitioners' assertions, the proceeding was an administrative investigation with a clear regulatory purpose, not a penal trial. The Commission has no power to punish. It regulates present or future conduct and to that end is authorized to inquire into all activities prohibited by the Act. All these activities, like the conduct section 15 prohibits, carry penalties, but this fact does not transform the Commission's investigations into penal trials calling for the specification of "charges" and circumscribed by strict evidentiary rules and formality. The adoption of any such theory would severely hamper the Commission's discharge of its regulatory functions.

Petitioners' claim of prejudice is wholly without foundation. They were accorded "due process" by any standards, and actually were given extraordinary notice and opportunities to prepare and present their position, including long intervals in which to consider the evidence and determine their course. They fully availed themselves of these

opportunities, and of the fact that all of the documentary evidence and witnesses belonged to the carriers.

On the basis of evidentiary strictness in a penal proceeding, as urged by the carriers, the Examiner erroneously excluded some 80 percent of the exhibits that were offered to establish the illegal rate-fixing arrangement. The exhibits were clearly relevant, reliable and probative and as such admissible in an administrative investigation. The Commission, in reversing the Examiner, made a careful and detailed review of the evidence and the applicable evidentiary rules. It also demonstrated that there was no distinction between the exhibits the Examiner had correctly admitted, which in themselves reflected the anticompetitive agreement, and the exhibits he excluded.

Hearsay is admissible in administrative proceedings and petitioners' reliance on the hearsay rule is misplaced. To the extent the exhibits contained hearsay, they were amply corroborated by other evidence, both oral and written, and petitioners are clearly in error in alleging that the Commission based its findings on "wholesale" hearsay. Moreover, the documents complained of are exactly the same kind as those on which this Court rested its recent decision sustaining the Commission in the case of Hohenberg Bros. Co. v. Federal Maritime Commission, No. 16,870 (February 14, 1963, as yet unreported).

IV. Petitioners are not parties "aggrieved by a final order" reviewable by this Court under the Review Act of 1950 (5 U.S.C. 1032, 1034). No order was issued by the Commission except one discontinuing the proceeding and later one denying petitions for reconsideration. This latter

of course is a wholly discretionary order. Mere findings of past violation, on which no order is based, are not reviewable. Federal Power Commission v. Hope Gas Co., 320 U.S. 591 (1944); California Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 270, 239 F. 2d 426, 433 (1956).

Petitioners' aggrievement is that the Attorney General has filed a penalty suit which, they say, could not have been brought without prior Commission determination of a violation. Petitioners' citations involving application of the doctrine of "primary jurisdiction" are inapposite. No problem exists here of accommodating remedies under the Shipping Act and the antitrust laws. The Shipping Act itself provides for the penalty suit and only the Attorney General is empowered to bring it. He may do so whether or not the Commission has made a determination. Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 66 (1953); United States v. Winegar, 254 F. 2d 693, 695-96 (CA 10, 1958); United States v. Waterman Steamship Corp., et al. (unreported, opinion of court attached as Appendix C to this brief), No. 62 Cr. 247 (S.D.N.Y.). Petitioners should not be permitted to invoke this Court's review on the theory that the Commission's determination was a prerequisite to the penalty suit.

ARGUMENT

I

THE COMMISSION'S FINDING THAT PETITIONERS VIOLATED SECTION 15 OF THE SHIPPING ACT IS SUPPORTED BY THE EVIDENCE AND LAW.

The record in this case makes plain that petitioners along with the other carriers in the U.S./South Africa trade during 1954-58 had an agreement or cooperative working arrangement which was neither filed nor approved under section 15 of the Shipping Act, and pursuant to which they unlawfully fixed transportation rates. Petitioners, of course, do not admit this but on the other hand they have been hard pressed to refute it, especially since all of the proof came from the files of the participating carriers and from testimony by their officers and agents.

Among other things, petitioners have portrayed the agency proceeding as a penal trial, attacked the "admissibility" of the evidence at length, charged the Commission was determined to find them "guilty," professed not to know what section 15 means nor what the investigation involved, disowned their agents, denied any agreement to fix rates, and asserted that in any event no harm came of their activities. However, the authenticity of the evidence the Commission relied on was not and could not be denied. Nor was there any serious attempt to dispute the fact that the carriers discussed rates, interchanged rate information and attended rate meetings, following which they generally quoted and charged the same rates. We shall first demonstrate that this activity was the result of an unauthorized agreement to fix rates, participated in and implemented by petitioners and all of the other lines in the trade.

A. Petitioners were parties to and carried out an unauthorized rate-fixing agreement, or cooperative working arrangement.

The Court may well wonder, after examining the samples of the documentary evidence discussed in paragraphs 1-22 of the Commission's report (Rep. pp. 13-23; JA 28-41), and these and other exhibits reproduced in the Joint Appendix (JA 233-322), by what process of reasoning petitioners can argue that they had no agreement. The answer is that petitioners are talking about a formal contract, reduced to writing and signed by the parties -- something along the lines of Agreement 8054 which petitioner Farrell and the Robin Line filed with the Board in March 1956 and to which petitioners Nedlloyd and Safmarine became parties on July 28 and September 10, 1958, respectively (JA 19).

Thus Nedlloyd contends it had no "real agreement" with the other lines in the trade (Br. p. 27); Safmarine argues that section 15 refers to "a binding legal contract" (T.Br. p. 25); and Farrell says that "a binding agreement" must be proved (Br. p. 20).^{8/} On this same basis, some of the carriers' officers and agents undertook to deny from the witness stand that any agreement existed, despite voluminous correspondence and memoranda reciting that a rate "agreement," "understanding," "commitment" or "concurrence" had been reached among one or more of the carriers; and the petitioners, still seeking to escape the impact of such exhibits, here characterize them as mere loose talk. E.g., see

^{8/} In the case of Safmarine, references are to the pages of its typed brief, cited herein as "T.Br." In the cases of Farrell and Nedlloyd, references are to the printed briefs since respondents were served with printer's proofs thereof.

page 20 of Farrell's brief and Nedlloyd's dissertation on "the occasionally inexact use of the verb 'agree'" (Br. p. 23).

Inexplicably, the Examiner accepted this utterly untenable construction of section 15. The section defines "agreement" to include "understandings, conferences and other arrangements" that "in whole or in part" fix or regulate transportation rates; control, regulate, prevent or destroy competition; or in any manner provide for a "cooperative working arrangement," and it requires the filing of a copy, or "if oral" of a true and complete memorandum, of every such agreement. As the Commission said, in reversing the Examiner, petitioners' interpretation "decimates section 15" by reading out of it the oral, tacit, or general agreements, understandings and arrangements with which Congress in enacting the section was expressly concerned because they are even more effective anticompetitive vehicles than formal, detailed and legally-binding agreements (Rep. pp. 33-38; JA 51-58).

The need for regulating informal arrangements of the type petitioners and their colleagues had was summarized as follows in the so-called "Alexander Report," issued by the Committee which exhaustively investigated shipping combinations before passage of the Shipping Act, 1916:^{9/}

^{9/} Committee on Merchant Marine and Fisheries, House of Representatives, 63rd Congress, Report of Investigation of Shipping Combinations under House Res. 587 in four volumes, Vol. 4, pp. 293-294.

"Reference should here be made (1) to the tendency toward oral understandings, instead of written agreements, between the lines operating to and from ports of the United States, and (2) the care which has been exercised to prevent agreements and understandings from becoming public. Oral understandings were described by various witnesses as 'safer' than written agreements, and the preceding chapters refer not only to many agreements which were of an oral nature from their inception but to several instances where written agreements were terminated and oral understandings substituted, the witnesses however admitting that the lines continue to follow the same rates and conditions which were previously observed under the written agreements. In fact, witnesses repeatedly drew the distinction between formal written agreements and oral or 'tacit' understandings.

"While not involving as strong a moral obligation as written agreements, the evidence shows that for all practical purposes oral arrangements are quite as effective. Judging from the manner in which the lines observe the same, the existing oral understandings give unmistakable evidence of the high order of integrity prevailing in modern business, and justify fully the phrase 'gentlemen's agreements.' Written agreements seem to have accomplished their purpose in many trades and are apparently no longer needed. The lines in some instances need not even meet in conference; they may avoid every appearance and every act which would seem to show the existence of an agreement or understanding; and yet operate in the same spirit of harmony that would prevail if a written agreement existed."

The provisions of section 15 are therefore about as clear and all-pervasive as the written word can make them. The section does not authorize any exemptions from its filing and approval requirements and it spells out that the word "agreement" means every sort of anticompetitive arrangement between parties subject to the Act. The Commission so held. (Rep. p. 38; JA 57-58). We think it highly improbable that

petitioners at any time could have misunderstood the meaning and scope of section 15,^{10/} and indeed Lykes, one of their colleagues, told them relatively early in the game that the informal rate-fixing arrangement constituted a "definite agreement between the lines" which "must be filed with FMB." (Rep. p. 20; JA 36-37, 270-71).

Be that as it may, the statute is quite plain. As this Court has recognized,^{11/} and the Ninth Circuit Court of Appeals has recently stated --

"it is no less a violation of the act to carry into effect an agreement which is merely implied from conduct, or an understanding not reduced to writing, than it would be to carry out a written amendment which lacks Board approval." Trans-Pacific Freight Conf. of Japan, et al. v. Federal Maritime Commission (No. 17,975, decided March 6, 1963, slip opinion p. 12, fn. 8).

Permeating petitioners' arguments, also, is the contention that no matter how cooperative and active they may have been in the rate arrangement, they maintained "freedom of action and independence" (Farrell Br. pp. 6, 17-20, 22, 23; Safmarine T.Br. pp. 6, 12, 28, 32-33, 35; Nedlloyd Br. pp. 3, 7, 22, 23-24, 25-27). In an atmosphere where

^{10/} Farrell nevertheless undertakes at pp. 21-22 of its brief to show that section 15 is "ambiguous." The cases it cites do not so hold. Typical are cases which involved not the question of having filed nothing under section 15, as here, but whether a filed and approved rate agreement made unnecessary the "separate approval" of certain actions said to be covered by the approved agreement, e.g., Green Coffee Assn. of New Orleans v. Seas Shipping Co. (1940), 2 U.S.M.C. 352.

^{11/} In Anchor Line Ltd., et al. v. Federal Maritime Commission, 112 U.S. App. D.C. 40, 299 F. 2d 124 (1962), cert. den. 370 U.S. 922 (1962), this Court upheld the agency's finding that the carriers had engaged in an informal cooperative working arrangement which was neither filed nor approved in violation of section 15. This case is further discussed later in this brief. See also Swift & Co., et al. v. Federal Maritime Commission, ____ U.S. App. D.C. ____, 306 F. 2d 277 (1962) wherein

all of the carriers concededly are striving for uniformity and stability of rates, it is idle to suggest that anyone really intends to set rates independently. Further, petitioners maintained the same "independence" after they signed Agreement 8054 which, like the informal arrangement, reserved to any party the right to alter a rate on giving 48 hours' notice. It is indisputable that Agreement 8054 (reproduced in Appendix B) is an agreement covered by section 15. The reservation referred to is itself anticompetitive since its main purpose is to insure notice and opportunity to discuss and agree as to whether a proposed rate change should be adopted, or at minimum afford the other lines time simultaneously to effect the change. (See Rep. p. 35; JA 54).

It is immaterial whether there was agreement on every rate. If there was an unauthorized agreement on any rate, and the record is replete with proof that there was, the violation is established. Though petitioners and the other lines were once competitors in a highly-competitive trade, they preferred the mutual advantages that could flow from an arrangement eliminating rate competition. The record clearly indicates that whatever reservations they had stemmed from uncertainty, particularly in the early stages, as to whether there was enough mutual trust among the parties to make the arrangement succeed, not from any desire to

11/ Footnote continued:

this Court sustained the agency's finding that a conference's attempt to apply an "interpretation" of its section 15 agreement "constituted a 'modification' and was the kind of agreement condemned by Section 15, unless approved by the Board" (p. 281).

remain outside the arrangement. The record also clearly shows that the lines were so successful in their pursuit of the arrangement that, as the Examiner himself found, the rates quoted by the lines on most items became identical. It would seem obvious that to achieve this result the rate arrangement had the support and adherence of all the lines. (See Rep. pp. 33-35; JA 51-53).

Petitioners cannot deny the contemporaneous documentary evidence establishing the arrangement, consequently they attack its admissibility and/or attempt to interpret it as showing that they were simply exchanging rate information for the purpose of keeping posted and, as Nedlloyd and Safmarine also claim, for the purpose of "following" the dominant lines. (Farrell Br. pp. 15, 17-19, 35; Safmarine T.Br. pp. 11-12, 25-28, 33, 35; Nedlloyd Br. pp. 3-4, 7, 14, 22, 25-26, 28-29).

These contentions are nonsense. Surely Farrell does not expect the Court to think that Mr. Farrell was "exchanging information" when it reads his statements that concurrence or agreement on rates was usually sought and obtained from Robin Line, Lykes and "of necessity" Safmarine; that he had obtained Robin's assurances of "full cooperation on rates and no rate cutting"; and that Farrell and Robin had agreed to raise their through rates to Pacific Coast ports from Africa to the levels requested by Nedlloyd. How is the Court supposed to appraise Farrell's activities through its agent, Mr. Phillips, the secretary of the "USA/South Africa Conference" of which Farrell was the sole surviving member. Phillips was a focal point for rate-fixing activities by all the lines.

He often served as Nedlloyd's conduit to the other carriers, distributed rate proposals for "concurrence" by all the carriers, and presided over meetings attended by representatives of Farrell, Safmarine, Lykes and Mormac at which rates were reviewed in detail and agreed upon. (See Rep. pp. 5, 13-14, 16-18, 21-22, 25; JA 18, 28-29, 32-34, 38, 39-40, 43, 153-54, 161, 165-166, 168-69, 187, 189-90, 192, 236-39, 246-52, 253-60, 276, 279, 283, 291-98, 306-7, 310-16.)

And how is the Court expected to view Safmarine's attendance at those same rate-fixing meetings and its agreement in the numerous actions taken. What about its efforts along with Farrell and Robin to keep International Ore's business away from a new competitor in the trade. What of its "necessary" participation in the overall arrangement to cooperate and jointly set rates as a significant factor in the outbound trade to Africa, attested to by Farrell, Robin and Lykes.

Moreover, is the Court expected to believe Safmarine was simply keeping informed so that it could follow the American lines when it joined in "pressing" Lykes for its definite agreement to increase rates "on automobiles and agriculturals and on container board/Kraft paper" as well as a "5% general rate increase" to be made effective after adjustment for the mentioned specific increases. Is that what Safmarine was doing when it threatened to "give up this whole idea of working together" because Lykes was insisting that rice should be excepted from the 15 percent general increase the lines put into effect March 1, 1955; and when it sharply criticized and retaliated against Lykes for apparently violating the "gentlemen's agreement" with respect to a shipment of tobacco.^{12/}

^{12/} See footnote next page.

(See Rep. pp. 13-15, 16-18, 19, 20, 21-23; JA 28-30, 32-34, 34-35, 38-40, 44-50, 152, 153-54, 161, 165-66, 168-69, 175-76, 234-39, 246-60, 280-81, 286-91, 293-94, 317-21.)

Besides pleading that it was only keeping informed so that it could follow the dominant carriers, Nedlloyd stresses its unimportance in this trade and "peripheral involvement" in the case (Br. pp. 3, 7-9, 25, 27). The Commission noted that Nedlloyd operated in this trade inbound from Africa to the North Atlantic, departing for Africa from the U. S. Pacific Coast, and that its interests extended to only a limited number of commodities. But it correctly rejected Nedlloyd's efforts to disengage itself from the violations of section 15, expressly finding that -

"During 1954 and thereafter it [Nedlloyd] exchanged rate information with the other lines, usually through Farrell's agent, the secretary of the USA/South Africa Conference. This included consultation and concurrence in rate changes, as well as the initiation itself of rate proposals on which it directly secured agreement from the other respondents"

- and further that Nedlloyd had concurred in the agreement to give 48 hours' notice of rate changes and had participated in the negotiations among the lines which resulted in agreement in May 1955 on general rate increases for the inbound trade that were put into effect shortly thereafter (Rep. pp. 5, 13, 31; JA 18, 28, 49-50).

12/ Safmarine contends (T.Br. pp. 11-12, 26) that it was "required to follow" the American lines by reason of section 19(b) of the Merchant Marine Act, 1920 (46 U.S.C. 876). Understandably, there is no elaboration of this claim. Aside from the fact that Safmarine vigorously asserted its position on rate matters, it never even hinted at the time that its actions were motivated by section 19(b) and they plainly were not. Self-interest was its guideline, the same as the other carriers. Moreover, a mere reading of section 19(b) shows its irrelevance here.

Nevertheless Nedlloyd would have the Court believe that it was merely "following" when it initiated an increase in the rate for sisal tow and solicited the agreement of Farrell, Robin, Lykes and Dreyfus; when it sought and obtained the concurrence of these carriers in a 15 to 20 percent increase of the through rates to Pacific Coast ports from Africa via New York; and when it convinced Dreyfus to raise rates on asphalt roofing because Dreyfus was "throwing revenue away by maintaining present rates."

And Nedlloyd's role as an unimportant onlooker is supposed to be recognized notwithstanding its participation in the negotiations leading to the rate increases for the inbound trade which it and the other lines agreed to in May 1955 and shortly thereafter put into effect. And what of the "assurance" Nedlloyd gave Robin that it would "agree and abide by any rate" for copper which Farrell and Robin negotiated with American Metal Co.; of its objection to the other lines that a \$1 reduction in the rate for mica waste would be useless as a traffic stimulant; and of its expression to Robin and Farrell of its "annoyance at the action they took [on the inward rate for paraffin wax in bags] without first having consulted with us, especially as it had been previously agreed to quote the outward rate." (Rep. pp. 16, 21, 23, 25-26; JA 31-32, 38, 40-41, 43, 150, 239-41, 262-64, 285, 291-307).

These specific references to petitioners' rate-fixing activities, which are samples only, demonstrate conclusively the hollowness of their contentions. Their characterization of what they were doing "can be viewed

only as a euphemistic description of an agreement not to compete."

United States v. Imperial Chemical Industries, 100 F. Supp. 504, 524 (SD NY, 1951).

Additionally, the Court will note from the foregoing samples that the very thing petitioners say reflects lack of agreement, namely, a line's occasional deviation from the ground rules, actually bespeaks the agreement's existence. As shown here and in other exhibits, such a deviation invariably produced a warning about the agreement's future, caustic criticism and/or threat of retaliation by any line which knew or suspected there had been a failure by another line to live up to the arrangement. Thus nurtured, the rate-fixing arrangement grew ever more efficient and solid.

The Commission refused to regard petitioners' "obvious anticompetitive activity" as though it were normal business conduct. It said the petitioners, in the language of section 15, were engaged in what is most aptly described as a "cooperative working arrangement" for the joint fixing or regulating of transportation rates and they attained the objective of this arrangement -- the fixing, quoting and carrying of cargo at identical rates, to a very substantial degree, with the result that competition in the trade was eliminated.^{13/} In other cases involving informal rate arrangements less conspicuous than this one, the Commission said,

^{13/} Further comment with respect to the "carrying out" or effectuation of the cooperative working arrangement will be found in Part II of this brief.

section 15 has been held violated, and it so concluded here. (Rep. pp. 34-35, 38; JA 52-53, 57-58). The Commission cited Maatschappij "Zeetransport" N.V. et al. v. Anchor Line Ltd., et al., 6 F.M.B. ____ (1961), aff'd Anchor Line Ltd., et al. v. Federal Maritime Commission, 112 U.S. App. D.C. 40, 299 F. 2d 124 (1962), cert. den. 370 U.S. 922 (1962).^{14/}

In Anchor Line the carriers were found, inter alia, to have been pursuing a cooperative working arrangement or agreement to fix rates, before approval of a proposed conference. There, as here, the carriers claimed that "uncontradicted" testimony and evidence showing they had no agreement was ignored, that the carriers were acting "independently" and competitors "normally quote the same rates," and that the Hearing Examiner (also a prior Board decision in the same case which found no violation -- one member dissenting) had been arbitrarily reversed. Unlike the present case, however, which is well supplied with direct and clear-cut evidence of the agreement, in Anchor Line the agreement had to be inferred from the carriers' conduct.^{15/}

Altogether unimpressed with the carriers' various complaints, this Court in Anchor Line went directly to the crux of the matter and affirmed the Commission as follows:

^{14/} The Commission also cited Wharfage Charges and Practices at Boston, 2 U.S.M.C. 245, 248, 251 (1940).

^{15/} Drawing such an inference is of course wholly proper. In cases under section 15 of the Shipping Act, as in antitrust cases, usually "the Government is without the aid of direct testimony that the [alleged violators] entered into any agreement. * * * In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators." Interstate Circuit v. United States, 306 U.S. 208, 221 (1939).

"Petitioners also complain that the Commission's findings respecting their violations of §15 are not supported by substantial evidence and reasons. We think the report and order under review [case title omitted] cite ample evidence and reasons to support the Commission's conclusions. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951); National Labor Relations Board v. Southland Mfg. Co., 201 F. 2d 244 (4th Cir. 1952); Minkoff v. Payne, 93 U.S. App. D. C. 123, 210 F. 2d 689 (1953)."

And the Ninth Circuit has stated, in Trans-Pacific Freight Conference of Japan, et al. v. Federal Maritime Commission, supra:

"It has long been recognized that such an administrative body has a broad discretion in effectuating the policies of the Act creating the Commission to determine whether certain statutory requirements apply to certain individuals or groups. In making those decisions such administrative bodies are not limited by common law concepts. The question always is whether the determination of the board or commission has 'warrant in the record and a reasonable basis in law.' Board v. Hearst Publications, 322 U.S. 111; Rochester Tel. Corp. v. United States, 307 U.S. 125; Gray v. Powell, 311 U.S. 402."

Although a court will not on review undertake to substitute its judgment for that of a regulatory agency, we are confident that if this were to be done here this Court undoubtedly would find as the Commission did that petitioners were engaged in unauthorized rate-fixing activities. It is, in any event, wholly clear that the Commission's decision is supported by evidence, reasons and law, and the Court, we submit, should so conclude.

1. Farrell's conduct was not directed or sanctioned by Maritime.

The opening 10 pages of Farrell's argument (Br. pp. 6-16) are devoted to the proposition that its rate-fixing activities as herein described were somehow "required," "mandated," "directed," "consented to," or at least known to, the Commission's predecessors, through their administration of the promotional ship subsidy program. These agencies also separately administered the Shipping Act, 1916, a regulatory statute, and it is this relationship that supplies the predicate for Farrell's claim that its failure to file and seek approval of an agreement under section 15 of the Shipping Act was, or now should be, excused. There is no question that such an agreement including all of the lines who were parties to the rate-fixing activities of 1954-58 was never fully executed and filed under section 15 until September 10, 1958 (Agreement 8054).

At the outset Farrell charges that the Commission "refused to consider" this argument whereas the Commission fully considered it and rejected it as without merit. (Rep. pp. 43-46; JA 63-67). The Commission also said the argument was largely one of alleged extenuating or mitigating circumstances and irrelevant to its administrative investigation into the question of non-compliance with section 15. In the administrative proceeding all of the American carriers, and even at times the foreign lines, sought comfort in the same position Farrell here advances. The Commission recognized that cooperation between Farrell and Robin "on a basis satisfactory to" the agency administering the shipping statutes was called for by these carriers' operating subsidy contracts. But it properly found that such

cooperation was not authorized to be undertaken without reference to the requirements of section 15, and by no stretch of the imagination could be deemed to include the widespread rate-fixing activities among all the carriers in the trade, American and foreign-flag alike, shown by this record.

Subsidy enables American carriers to compete against foreign-flag lines. The sole purpose of the subsidy contract provision Farrell relies on, which originated in 1940 and was unique, was to prevent the two American-flag lines (Robin and Farrell and/or its predecessor) from wasting subsidy on one another in the U.S./South Africa trade and enable them to compete against the foreign lines which were then dominating that trade.^{16/} The provision was deleted in 1957, having long since served its purpose, in favor of a routine subsidy contract "coordination" clause governing "spacing, regularity and frequency" of sailings in conjunction with other subsidized services on the same trade route. This is

^{16/} In fact in 1940, during the same year the subsidy contracts here discussed were first awarded, the U. S. Maritime Commission in Green Coffee Assn. of New Orleans v. Seas Shipping Company [Robin Line], 2 U.S.M.C. 352, expressly pointed out (p. 358) that -

"Operating-differential or other subsidy contracts executed under the authority of the Merchant Marine Act, 1936, do not augment statutory regulatory procedure in respect to rates, charges, regulations, or practices of common carriers. The purpose of the contract provisions mentioned was to prevent, if possible, the use of subsidy payments under the contract to offset losses resulting from destructive competition between American-flag carriers operating in the same trade."

Farrell cites this case at p. 22 of its brief. However, it does not mention the only portion of the case that is relevant here.

the clause Farrell partially quotes on page 9 of its brief. The clause does not mention rates, although Farrell depicts it as giving "blanket consent" for rate-fixing and anything else covered by section 15; proceeds to gloss the matter of how such a clause or any other provision of the subsidy contracts could conceivably authorize "coordination," rate-setting or whatever, with foreign-flag lines; and finally arrives (p. 16) at the conclusion that "Government compulsion" was at the root of the rate-fixing activities in question.

It is interesting that none of the many contemporaneous writings in this record thus attribute to the Government responsibility for what the carriers were doing in 1954-58; none of the alleged conversations with Maritime personnel are shown to have concerned section 15; and Lykes, which is an American subsidized line like Farrell, believed as long ago as December 1954 that the carriers were obligated by section 15 to file their agreement and secure approval of their activities. Even a glance at section 15 told them that. Its provisions, as before noted, are sweeping and contain no authority for any exemption from the filing and approval requirements.

The Commission cogently summed up its position on this aspect of the case as follows (Rep. pp. 45-46; JA 66-67):

"The record likewise does not show that anything like the arrangement which prevailed during the 1954-58 period was revealed to or known to the Board or its personnel, as successors to the Commission, much less that it was directed or approved by them. That arrangement, involving as it mostly did, widespread rate-fixing among all carriers in the trade, citizen and non-citizen alike, was not

at all what the 1938 provision of the subsidy contracts envisaged. The American carriers were not united to compete with the foreign-flag lines, they were acting in concert with such lines to eliminate competition.

"Respondents' argument that the arrangement 'promoted stability,' aided the subsidy program, was 'in the public interest,' and not objectionable under section 15, is quite beside the point. Such matters were for the Board, the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves. Respondents prevented any Board consideration by ignoring the eminently clear requirements of section 15 and thus frustrated it for years. We think it impossible for anyone now to state that what transpired between respondents was all well and good but even if this were not so, the impact of the statute manifestly cannot be made to depend on the ex post facto chance that the violation was not harmful. Section 15 may as well be scrapped as to attempt to administer it in this fashion.

"It goes without saying that we find untenable the suggestion that respondents' arrangement constituted a 'technical' violation of the law. It should be noted, furthermore, that section 15 affords little room for so-called technical violations. To us the breadth and force of its language literally implore attention and obedience, or at the very least inquiry if in any doubt as to the propriety of proposed conduct."

Farrell's point in discussing Agreements 8225 and 8225-1, Greater Baton Rouge Port Commission and Cargill, Inc., 5 F.M.B. 648 (1959), aff'd sub. nom. Greater Baton Rouge Port Commission, et al. v. U.S.A. and F.M.B., 287 F. 2d 86, reh. den. 293 F. 2d. 959 (CA 5, 1961), cert. den. 368 U.S. 985 (1962), is less than clear (Br. pp. 16-17). That case, unlike this one, involved the approvability of a section 15 agreement. Furthermore,

as Farrell surely knows, the violation of section 15 which was found in that case for failure to have filed the agreement at an earlier date, was referred to the Department of Justice, as per the routine practice, and the Department concluded to institute a civil action for the statutory penalties which is presently pending in the Southern District of New York. Approvability of an agreement is not, of course, governed by the fact that there may have been a prior violation in failing to seek approval under section 15, nor does approval eliminate such prior violation.

2. Safmarine and Nedlloyd are responsible for the acts of their agents.

Safmarine and Nedlloyd contend that company policy forbade the entering of rate agreements, and if this was done in violation of law the offense was that of their agents in the United States and not of the companies (Safmarine T.Br. pp. 7a, 9-10, 11, 23-24; Nedlloyd Br. pp. 7, 20-22). There is nothing to be said for this position. Assuming the policy existed, it was simply an aversion to formality, i.e., putting it in writing, at least until the companies were absolutely sure of the other parties to the rate arrangement, as apparently Nedlloyd and Safmarine finally were in July and September 1958 when they signed Agreement 8054.^{17/} That they did not object to but favored and actively

^{17/} Safmarine's attitude, for example, was aptly summarized in Ex. 144 dated May 9, 1956 (JA 321-23) wherein a conversation with Messrs. Mercer of Safmarine and McGrath of States Marines' "Safmarine Agency," is reported as follows:

(continued next page)

participated in the informal cooperative working arrangement -- the "gentlemen's agreement" -- is manifest from the record in this case.

It is to be expected that Safmarine and Nedlloyd would seek to avoid the consequences of that participation, but that they should carry this to the present extreme of attempting to disown their agents is astonishing. These agents were clothed with general authority to handle their overseas principal's commercial affairs. If limitations existed on the exercise of that authority, they did not include an inability to handle rate matters as otherwise the agents could not discharge their prime mission, the solicitation and booking of cargo for the principal. ^{18/}

17/ continued:

"Mr. Mercer said that he did not wish to exchange any document with anybody nor did he wish to join a conference. He stated that he would at all times cooperate, particularly if it is a question of getting better rates; but that he wanted no formal agreement and stated that the South African Government opposed any policy of conference. He pointed out the fact that States Marine is a member of a great many conferences on their other services."

In connection with the foregoing, cf. Ex. 81 (JA 168, 185, 270) and Safmarine's brief, pp. 27-28, 33-35.

18/ Safmarine was represented in the United States by States Marine Corp., particularly its Messrs. McGrath, Buser and DeMarco; Nedlloyd was represented by Java Pacific Line, Inc., particularly its Messrs. Severiens, Keers and Drost. All these men have had long experience both in commercial shipping and in handling their principal's affairs which, as the record shows, included rates (see also Rep. p. 29; JA 47, 168, 185-87, 194-96). Safmarine admits that Mr. McGrath had "authority to make agreements as to rate matters" but its attempt to depict McGrath's assistant, Mr. Buser, as an unimportant subordinate who attended the rate meetings "merely to ascertain the action intended to be taken by the powerful American lines" is hardly valid. (Tr.Br. pp. 27, 32). After 11 years with States Marine Corp. during a good portion of which he worked on Safmarine business, Buser in May 1958 was employed directly by Safmarine and was its traffic vice-president in New York at the time of the hearings in this case (JA 185).

Moreover, the record herein shows that each agent kept his principal posted, especially as regards his rate-fixing activities with the other lines in the cooperative working arrangement (e.g., see JA 286-297, 308-23). But there is no evidence that a principal in any way questioned such conduct. To the contrary, considering the five-year period over which the rate arrangement prospered to the point where even a formal contract became universally acceptable, the principals not only approved and ratified, but embraced and nourished, their agents' activities in this respect. The agents at all times acted in the names of their principals in entering and carrying out the rate-fixing arrangement, and the principals received the benefits of this activity.

In the circumstances, it is perhaps unnecessary to point out that even if this were a penalty proceeding (which it is not), section 15 is by its terms a civil penalty statute and the general rule that a principal is responsible for the acts of his agent involving civil liability would be fully applicable. Indeed, the general rule that a principal may not be held responsible for the criminal act of his agent, has its exceptions. Where there is no requirement to prove criminal intent and there is a strong policy of protecting the public interest, it has been held that the courts are warranted in punishing the principal for the servant's act. United States v. Parfait Powder Puff Co., 163 F. 2d 1008 (CA 7, 1947), cert. denied 332 U.S. 851 (1948). The contentions and authorities urged by Safmarine and Nedlloyd in this regard are

completely unfounded.^{19/} If adopted, administration and enforcement of the Shipping Act would be paralyzed since ocean carriers of necessity conduct much of their far-flung international business through agents located abroad with wide latitude in handling the carriers' commercial affairs.

II

THE COURT NEED NOT REACH THE COMMISSION'S FINDING THAT PETITIONERS ALSO VIOLATED SECTION 15 BY FAILING TO FILE THEIR AGREEMENT, BUT IF REACHED THE COURT SHOULD AFFIRM THE COMMISSION.

Petitioners assign major portions of their briefs to an attack on the Commission's determination that failure to file their anticompetitive agreement was in itself a violation of section 15 (Farrell Br. pp. 29-34; Nedlloyd Br. pp. 8, 14-20; Safmarine T.Br. pp. 8-9, 13-23).

^{19/} Nedlloyd quotes language from United States v. Corlin, 44 F. Supp. 940, 946 (SD Cal 1942) concerning the criminal liability of a principal for the acts of its agent, apparently without reading the last six words of the quote which provide "though he might be liable civilly." This case involved a 32-count indictment for mail fraud and conspiracy. Safmarine and Nedlloyd both rely on a statement in Nobile v. United States, 284 Fed. 253, 255 (CA 3, 1922) but neglect to point out the court's language at page 255 to the effect that the principal's civil liability extends far beyond his criminal liability for the act of his servant. This case involved a criminal information for the sale of alcoholic beverages in violation of the National Prohibition Act. Reliance is also erroneously placed upon Holland Furnace Co. v. United States, 158 F. 2d 2 (CA 6, 1946), involving a criminal information for violation of an order of the War Production Board; United States v. Food & Grocery Bureau of So. Cal., 43 F. Supp. 966, involving a criminal indictment for a price fixing conspiracy; and Paschen v. United States, 70 F. 2d 491 (CA 7, 1934), involving an indictment for income tax evasion.

Petitioners argued this question to the Commission in an effort to have it eliminated from the case as a ground of violation. Their position was, and is, that section 15 only makes it an offense to "carry out" an ^{20/}unfiled and unapproved agreement.

Although the Commission's answer to the question they urged was not what petitioners hoped for, this hardly justifies their present charge that the answer was one of expediency in furtherance of a predisposition to sustain a case against them. Petitioners say the Commission realized, indeed "admitted," there was no proof of "carrying out" so it decided that failure to file is a violation and went so far, in casting about for rationalization, as to attempt to apply retroactively a 1961 amendment to section 15 of the Shipping Act.

The fact is that the Commission ruled on failure to file simply because petitioners were, here again, advancing what it felt was a basic misinterpretation of section 15 that ought not, in the interest of proper administration of the Shipping Act, remain unanswered. After setting down 38 pages of its explication, most of them devoted to findings and conclusions covering petitioners' unauthorized and effectuated rate-fixing arrangement, the Commission in cleaning up the balance of the case

^{20/} Petitioners cite the orders of investigation as showing the Board believed "carrying out" was the sole section 15 offense. This cannot be established from the orders. They recited that agreements "which have not been filed" may exist and may have been "carried out before approval." Furthermore, whatever the Board believed, the orders obviously instituted a full investigation into violation of section 15, necessarily covered failure to file, and petitioners have fully litigated this question. (See JA 1-9).

took two and one-half pages to dispose of petitioners' argument that failure to file is not a violation (Rep. pp. 39-41; JA 58-61).

It did not have to rule on the issue in this case but that would not have aided petitioners. Their rate-fixing arrangement was quite obviously implemented. For like reason the Court need not reach the issue.

Petitioners nowhere shed light on their notion of "carrying out." They only baldly assert there was no proof of it. Apparently, they expect the Court to assume that nothing came of the nearly five years of concerted rate-fixing shown by this record. Over that period they and their colleagues acting together set and adjusted rates and tariffs and did this so effectively that within the first two years they had achieved virtual full parity on the rates used by all the lines in the trade. They thus implemented and carried out their underlying working arrangement to control, prevent or destroy competition by fixing or regulating rates. They further effectuated the arrangement by publishing and quoting the agreed rates and booking cargo on the basis thereof, by acting together to deny rate changes requested by shippers, and by admonishing one another to maintain a united front and to adhere to the agreed rules.

All this is apparent from the Commission's report, from the documents quoted therein and in the Joint Appendix, and from the rate-fixing examples hereinabove reviewed. We shall not burden the Court with

another recital of specifics except to point out that the Commission, after reviewing some of the evidence, expressly found, inter alia, that the cooperative working arrangement among all the lines (1) often resulted in the establishment of "identical rates adhered to by each of them"; (2) brought about "tariff rates" that were "identical on most items by early 1956"; (3) included agreement on rate levels "for specified commodities and groups of commodities, and from time to time on general rate increases" such as the 15 percent general increase which the lines put into effect on March 1, 1955 in the outbound trade and the increases for the inbound trade which they agreed to in May 1955 and put into effect in June 1955; and (4) was, in short, "quite successful in producing concrete results", i.e., "the quotation of similar rates" by all the lines, which the Examiner also found. (Rep. pp. 14, 21, 30-32, 34, 35; JA 29, 37, 38, 48-51, 52, 53).

If the Court nevertheless wishes to consider the question of whether failure to file is in itself a violation of section 15, respondents submit the Commission should be affirmed.^{21/} Although the Commission's report (pp. 39-41; JA 58-61) adequately disposes of the issue, some comment on petitioners' arguments seems in order here. The precise statutory language -- which Nedlloyd calls "purely procedural" (Br. p. 19) but in which the Commission said it could see "nothing perfunctory" -- is

^{21/} Respondents would welcome the Court's ruling on the question. However, in similar cases the Court has declined to reach it. Anchor Line Ltd. v. F.M.C., supra; Swift & Co. v. F.M.C., supra.

that "every common carrier by water * * * shall file immediately" with the Commission any agreement covered by section 15; and further the final paragraph of the section, which makes it an offense to violate "any provision of this section."

In the Commission's view, there was a clear purpose in this language. Without a requirement for immediate filing, one of the vices uppermost in the mind of Congress when section 15 was enacted would be encouraged, namely, the making of oral, tacit and secret anticompetitive agreements of which the regulatory agency was uninformed. Safmarine may think this "a mere mental operation which could have no practical effect" (T.Br. p. 14) but the Alexander Committee that wrote the Act had a decidedly opposite opinion. It took the realistic and eminently sensible view that anticompetitive compacts were intended to be effectuated, else why make them, so it provided for their immediate disclosure and supervision. The Act does not say file when you are ready to carry out. It says file "immediately." To permit filing at the parties' convenience is to permit no filing, and thus defeat the objectives of the Act. (See JA 54-57).

There is nothing unusual about proscribing the failure to file competition restricting agreements. The behavior dealt with by section 15 is analogous to that covered by section 1 of the Sherman Anti-Trust Act (15 U.S.C. 1) and it makes "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign countries, illegal." Under this section such an agreement is in and of itself a violation of

the antitrust law without the requirement of an overt act. United States v. Trenton Potteries Co., 273 U.S. 392 (1926); United States v. Kissel, 173 Fed. 823 (C.C.S.D. N.Y. 1909), reversed on other grounds, 218 U.S. 601 (1910). While section 15 of the Shipping Act makes possible the approval of certain anticompetitive behavior, the same considerations which require the proscription of uneffectuated agreements under the Sherman Act require a like proscription of uneffectuated agreements under the Shipping Act.^{22/}

Petitioners make a great point of the Commission's statement that certain Board decisions contained obiter dicta on the subject of failure to file, and they emphasize the testimony concerning those cases given before the so-called Celler Committee by former Board Chairman Morse. Petitioners do not, however, point out that both Mr. Morse and the Committee Chairman, Mr. Celler, expressed their personal conviction that failure to file is in itself a violation of section 15.^{23/} And it remains

^{22/} Cf. Nedlloyd's attempt to differentiate antitrust and Shipping Act policy (Br. p. 18).

^{23/} "The Chairman (Mr. Celler). * * * But it strikes me, when one reads the very first sentence of section 15 -- it seems as clear as a pike-staff -- that the mere failure to file is a violation. You have the following in the statute: [quoting first sentence of §15]. Now, the word 'immediately' is significantly used. Congress would not have used the word 'immediately' if you had to wait for action under the agreement before you could spell out a violation. Then you go to the sanctions provision, the last sentence in section 15, which states [quoting penalty provision]."

* * * * *

"Mr. Morse. Mr. Celler, let me answer that. I was merely reporting it to you what the Board's decision had been. I was not giving you my own view. I will say to you my personal view is it is a violation of section 15 if they fail to file the agreement immediately."

(continued)

the fact that none of the Board cases referred to actually involved the filing question, there having been effectuation, partial or complete, of the agreements there in issue. As the Commission said, no cases ruling on the filing question occurred until early 1961 and they held non-filing to be a distinct violation. Manifestly the Commission did not, as petitioners claim, attempt to apply retroactively the 1961 amendment to section 15 (Public Law 87-346, 75 Stat. 762). It relied not only on the plain language of the section as originally written but on its legislative history, and it said: "If there has been any past doubt, we fail to see why." It cited U. S. Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 486-87 (1932) as having clearly indicated long ago that section 15 was violated by failure to file an agreement. And it viewed the 1961 amendment as simply making this "even more plain (if that is possible)." Far from creating a new requirement, the Celler Committee set about to insure that there could be no interpretation of section 15 of the sort petitioners are urging.

23/ continued:

Monopoly Problems in Regulated Industries, Hearings of Antitrust Subcommittee of House Judiciary Committee, 86th Cong., 1st sess., Part 1, Vol. 1, pp. 73, 74 (Oct. 13, 1959).

III

THE COMMISSION COMMITTED NO PROCEDURAL OR EVIDENTIARY ERRORS
AND PETITIONERS WERE NOT DENIED DUE PROCESS.

The seven carriers who were respondents in the agency proceeding did their best to portray it as a penal trial. With this as their main predicate, they made a vigorous and prolonged attack on every document sought to be offered in the investigation, consuming much of the hearing time in this endeavor, and ultimately requiring the issuance of an unusually detailed Commission report. The surviving carriers, the three petitioners here, still pursue the theme that they were on trial and cite the Commission's report as proof that it was determined somehow to find them "guilty." (Farrell Br. pp. 23-25; Safmarine T.Br. pp. 7, 7a, 10, 24-25, 36-38; Nedlloyd Br. pp. 11-12, 21, 23, 29-30).

Even a cursory review of the record will show that this is a baseless charge. The truth is that by their strategy petitioners and their colleagues left the Commission with no choice but to undertake the necessarily lengthy task of salvaging its administrative processes from the damage they had managed to inflict. No warrant exists for describing the Commission's effort as "astounding" and "vituperative" (Nedlloyd Br. p. 11). Moreover, the Commission nowhere suggested the carriers were not entitled to full and fair representation of their interests. It did say such representation should be kept within the framework of the rules applicable to an administrative investigation, it spelled out those rules, and it meticulously reviewed and discussed the evidence (Rep. pp. 4, 6-30; JA 17-18, 20-48).

The Commission is charged with administration of the Shipping Act, and its primary function is to regulate present conduct and to prescribe rules and regulations concerning future conduct of persons subject to the Act. It is not a function of the Commission to punish violators of the Shipping Act for past offenses. That power is exclusively vested in the Attorney General and the several United States Attorneys (28 U.S.C. 507). In connection with its regulatory responsibilities investigation is indispensable in order that the Commission may become fully aware of and regulate practices in the areas subject to its jurisdiction. Under the authority of section 22 of the Act (46 U.S.C. 821), the Commission, upon its own motion, may investigate any violation of the Act (past, present or proposed) in such manner and by such means, and may make such order, as it deems proper.

The fact that the Commission is looking into suspected violation of section 15, a penal provision, does not convert the inquiry into a trial for penalties. Every proscribed activity in the statute carries a penalty clause. The Commission pursues a great many investigations into these activities and all of them, on petitioners' theory, would become penal trials circumscribed by the strictest rules of evidence and formality, including detailed specification of "charges" in the nature of an indictment. The regulatory paralysis this would generate need not be labored.

Nor are petitioners helped by arguing that the Board "knew" the violations had been discontinued before the inquiry was commenced, hence the proceeding could only have been held to punish them. How the Board

knew the violations were at an end, or that there had in fact been violations, or what their character was, is nowhere explained by petitioners. The Board was aware that some of the carriers had at various times become party to an agreement on file with it (No. 8054, which Dreyfus, one of the principals, never signed) but obviously this does not prove the investigation had no regulatory purpose. Until the inquiry was held, the agency could not know either the nature of the carriers' past activities or whether there was a current need for action to bring them into conformity with the law. It was seeking information on which to act, if necessary, not to punish.

The Commission has a duty to ferret out past or prevailing carrier practices in any case where it believes that would be useful. By doing so, as we have noted, the Commission becomes informed of the nature of carrier wrongs and can regulate more intelligently and effectively. Moreover, in performing its investigative functions the Commission is not merely concerned with persons who may be found to have engaged in illegal practices. It is concerned as well with others who may be contemplating such practices and its findings and views are intended to be of value in securing adherence to the law by the industry at large. As the Commission told petitioners and their colleagues, in denying their requests for reconsideration (JA 71):

"Some of the respondents claim they are unable to determine what their future conduct should be, despite the extraordinary lengths to which our report goes in spelling this out. Instead of attacking the report, we believe the respondents would be better advised to give it more objective

Although petitioners generally claim prejudice, there is nothing that remotely supports this. They knew what the investigation concerned and were in no way disabled from amply protecting their interests. The record in fact attests that the seven respondents (petitioners and four other carriers) obtained for themselves by their individual, collective and continuous demands and objections, considerably more of an opportunity to present their case than was called for, considering the true nature and objectives of this proceeding, and by any standards were accorded "due process."

No hearings were held until seven months after the Board's orders of investigation were issued (JA 1-9, 15-16). These orders, in the customary manner, notified the carriers of the possible proscribed activity, areas of their operations, and periods of time to be investigated. No carrier sought any amendment of the orders, so it must be presumed they understood them. The orders clearly satisfied the requirements of subsection 5(a)(3) of the Administrative Procedure Act (5 U.S.C. 1004(a)(3)) and the Board's rules by informing the carriers of the legal and factual issues involved.

Three months before the hearings the carriers, in response to Public Counsel's subpoenas, produced documents from their files, and these remained available for study and use by all the parties. Public Counsel had the duty of assembling and presenting evidence relevant to the matters under investigation (see fn. 6, supra). His knowledge of the facts was nothing more than what he had learned from the documents so produced and

substantially less than what the carriers possessed. All of the documents and witnesses belonged to the carriers. Contrary to suggestions here made, Public Counsel did not instigate the investigation and was not a "prosecutor." He also was governed, as the carriers were supposed to be, by the Board's unchallenged investigatory orders. The carriers nevertheless continually demanded "particulars" from Public Counsel and on two occasions the Examiner required that these be furnished, the first, six weeks before the hearings began, the second, five weeks before the carriers undertook their cross-examination.

Additionally, the carriers requested that all of their cross-examination be deferred until they had heard Public Counsel's presentation, and the Examiner so ruled over Public Counsel's objections. Because of this the carriers had more than two months to further study the evidence before they cross-examined their own officers and agents, who were the sole witnesses in the case.^{24/} This request by the carriers also served to put off rulings on the admissibility of the exhibits, a procedure which, interestingly enough, petitioners now find some fault with (e.g., Nedlloyd Br. p. 29). When the carriers finally undertook their cross-examination, they queried their officers and agents at length, offered new testimony, presented some 57 additional exhibits, and in short, undertook to meet Public Counsel's presentation and also develop their own case. The Examiner thereupon asked if they had "any further affirmative offerings" and received negative replies. (JA 228; see also JA 198-228).

^{24/} See next page

24/ Mr. Maddy [Farrell]: * * * I want to move that the cross-examination of Mr. McGuire and subsequent witnesses be deferred until the next hearing.

Mr. Longcope: I join in that motion on behalf of Dreyfus, Mr. Examiner.

Mr. Douglas [Lykes]: Mr. Examiner, I join in that motion. * * * I think we should go through in an orderly procedure, have direct examination and identify all the documents, have Public Counsel now put his cards on the table. * * * We then have a recess, such as you have indicated in your last ruling, and that we come back and have the cross-examination * * *.

Mr. Poor: I will join in that request on behalf of Safmarine.

Mr. Ira Evers: Moore-McCormack would likewise join in that request.

Mr. White: I also join in that request for Nedlloyd.

* * * * *

Mr. Hood [one of Public Counsel]: Mr. Examiner, I think reserving cross-examination until some point in the future, until we reconvene would be unduly putting off things. * * * I don't accuse anyone of improper conduct. We have not kept the documents that were available to us, that is, Public Counsel has not kept them secret during this period. All of the respondents had equal access to the documents. I don't think we were obliged to plead our evidence, so to speak. * * * We are putting in a rather limited amount of documents, and it would seem to me that the fact that we used one document rather than another to prove agreement does not call for an undue delay in cross-examination.

Examiner Gray: I will rule that the cross-examination may be deferred until Public Counsel has completed his presentation.

* * * * *

Examiner Gray: I don't know whether I fully understood your remarks, Mr. Hood, but I had intended to rule that you should complete your presentation, then the respondents would have time to digest the record and then cross-examine.

Mr. Aptaker [one of Public Counsel]: Mr. Examiner, before you recess I would like to add a comment for the record on this ruling. This proceeding until now has brought forward the identification of 16 documents, each of which bears a date certain, refers to named persons, relates to specific commodities, discusses dollars-and-cents rates, and in every single respect advises every one of the respondents precisely what is embodied in the evidence offered or identified hitherto.

It seems to me a substantial delay in the preparation of cross-examination is a clear example of magnifying difficulties beyond all reasonable proportions. I want to add, too, that every one of the documents from which Public Counsel's evidence is drawn or all the evidence put in this morning at least has

(continued)

After the testimony there were about 220 exhibits which had been identified, discussed and testified to, with portions from many read into the transcript and adopted by the witnesses in their testimony. They were part of the case, for all practical purposes, though not actually admitted because of the procedure the carriers themselves had urged. Two days of additional hearings were then held to argue about the "admissibility" of the exhibits. Public Counsel offered in evidence 142 of the exhibits, the carriers entered vigorous and prolonged objections to nearly all of them, urging the need for evidentiary strictness in "penal" cases, and the Examiner admitted only 29. The rejected exhibits were made the subject of an offer of proof by Public Counsel and were subsequently received in evidence by the Commission. In addition, at this hearing the carriers offered exhibits which were admitted, and both sides withdrew certain exhibits.

Petitioners charge that the Commission acted "capriciously" in admitting the documents. They object mainly to what they call "wholesale use of hearsay" in a penalty trial. Nedlloyd adds that the Commission took the position the Examiner "was necessarily in error" in receiving only 29 exhibits, then says the Commission was necessarily in error in receiving

24/ Continued:

been drawn, has come from documents which have lain in a room here, available for the inspection of each of the attorneys here. They have had an opportunity equal to our own for the examination and review of these documents.

It seems to me that a claim of surprise or of disadvantage at this point is indeed a questionable claim."

(Tr. 88-93; JA 150-51).

the remainder (Br. pp. 29-30). All of this ignores the Commission's careful and detailed discussion of the evidence, of the Examiner's rulings thereon, and its reasons for not sustaining him. On the grounds hereinabove stated, the Commission rejected the carriers' attempts to distort the character of the proceeding, and held that their insistence on strict evidentiary rules must fail with its foundation. (JA 20-22).

"All evidence which is relevant, material, reliable and probative," said the Commission, is admissible under our rules and section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)), consistent with the long-established principle that technical evidentiary rules or "common law exclusionary rules" do not apply in administrative proceedings. In support of this (also its ruling as to the nature of its proceedings), the Commission cited specific prior Board precedent, Practices of Fabre Line and Gulf/Mediterranean Conf., 4 F.M.B. 611, 633-36 (1955) and a wealth of judicial authority. It said that "essential fairness" could be achieved in its investigations without lengthy controversy over technical evidentiary niceties, as had occurred here. (JA 24-28, 41-48, 51-52).

The Commission pointed out that some 80 percent of the documentary evidence had been excluded though every piece of it was an undeniably-authentic writing by the carriers' officers or agents which was relevant and probative on the very question under investigation, namely, whether they had engaged in an unauthorized anticompetitive arrangement or agreement. It viewed this contemporaneous evidence as manifestly better than testimony reluctantly given years later. It said it could see no

distinction in the quality and competency of the evidence the Examiner correctly received -- which itself reflected the illegal agreement -- and that which he rejected. And it demonstrated that there was no difference by several illuminating comparisons (e.g., Rep. p. 24; JA 41-42).

On the alleged wholesale use of hearsay, the Commission stated that in some instances the evidence objected to was not hearsay and that hearsay is in any event "admissible" in administrative proceedings. It said there was no question in this case of exclusive reliance on hearsay, the record being amply fortified by other direct and corroborative evidence, both oral and written, including direct and cross testimony by the very men who authored many of the communications. (JA 27-28, 41-48).

Recently this Court, in Hohenberg Bros. Co. v. Federal Maritime Commission, No. 16,870, decided February 14, 1963 (as yet unreported) sustained the Commission's finding that Hohenberg, a shipper, had violated section 16 of the Shipping Act (46 U.S.C. 815). In support of its decision the Court relied heavily, as had the Commission, on contemporaneous inter-office communications which had passed among officials, not of Hohenberg, but of the steamship carrier, a co-respondent in the Commission proceeding. Those were the same kind of documents petitioners here complain of, exactly as Hohenberg did. And here, unlike the situation in Hohenberg, the record includes directly parallel and corroborating evidence from petitioners' files and from the mouths of their officers or agents.

Petitioners nowhere really contest the accuracy of the contemporaneous documents, because they clearly cannot do so. It is equally clear that the Commission did not err in receiving the documents as exhibits.^{25/} Even a few of them depict the unauthorized arrangement, and cumulatively they offer a most convincing picture of section 15 violation. Realizing this, the carriers waged a campaign against admitting the evidence, attacking it link by link. Needless to say, if such efforts were to prove successful the Commission would be seriously hampered in discharging its investigative and regulatory functions.

Nedlloyd argues it was "denied proper notice," even "affirmatively misled," and seeks to buttress this with the contention that the Commission prejudiced it by finding it had violated section 15 in failing to file the agreement, whereas the Board's orders only put in issue the "carrying out" of agreements (Br. pp. 5-6, 8-9, 11). As shown in Parts I and II of this brief, the Commission found that Nedlloyd (and the other carriers) had an anticompetitive agreement and carried it out vigorously,

^{25/} Farrell says the Commission should have remanded the case because the companies only half-heartedly met "obviously inadmissible" documents (Br. 5, 27-38), and Nedlloyd indicates, without attempting to show, a denial of the right of cross-examination (p. 32). These claims are devoid of merit in the circumstances of this case. According to the carriers, everything Public Counsel offered was "obviously inadmissible" but they fought it to the hilt, assuming nothing in that respect, as indeed they could not absent the evidentiary rulings they had caused to be postponed to the close of the hearings. They not only attempted to meet Public Counsel's offerings, they fully presented their own case including "cross-examination" of their own personnel at length. At the end of all this, as noted above, they advised the Examiner they had no further "affirmative offerings."

in violation of section 15. As shown in Part II, moreover, the question of whether failure to file that same agreement was itself a violation of section 15 was also treated as an issue in the case and was fully argued by the parties including Nedlloyd. Consequently, Nedlloyd's alleged understanding of the issues based on the investigative orders could not have prejudiced it. Nor could the Commission's ruling on this purely legal question have had any bearing on the evidence. The carriers argued there was no agreement. Obviously, there was no issue over the fact that none had been filed.^{26/}

Safmarine likewise complains about notice but on the ground that the Board's orders "initiated a penal proceeding" (T.Br. 36-38). It admits that if the proceeding "were merely to gather information, it might well be that no particularization would be required." It has previously been shown that this latter was the purpose of the proceeding and that petitioners were given not only the required notice for an

^{26/} Nedlloyd's brief at pp. 9-11 contains many misstatements. It says (p. 10) that the matter of its participation in the 48-hour notice agreement was not dealt with in the Commission's report, whereas the Commission expressly found it had "concurred" in that agreement (Rep. p. 31; JA 49). It says (p. 11) that the Examiner dismissed the charge that it had "concurred in" rate changes, whereas the "charge" the Examiner dismissed was that Nedlloyd had "conformed" to an agreement, and Nedlloyd so states on the prior page (p. 10). It professes to have been misled by the "specifications" Public Counsel was required to furnish after the evidence was in (p. 10) whereas it was not and could not have been misled. It was in fact well-informed. The specifications were furnished after Public Counsel's evidence was in, and Nedlloyd then had five weeks to study his case and prepare its own case before going forward. (See JA 223-28).

administrative investigation but extraordinary opportunities to prepare and represent themselves, of which they took full advantage. Plainly, they were not denied "due process."^{27/}

IV

PETITIONERS ARE NOT "PARTIES AGGRIEVED" BY THE COMMISSION'S FINDING OF PAST VIOLATIONS.

While we have demonstrated that the Commission's report is in all respects sound and if reviewed should be affirmed, the question remains as to whether it is appropriate for this Court to review the case. Respondents originally raised this question in their motion to dismiss filed September 26, 1962, which the Court on December 17, 1962 denied without prejudice to renewal upon the hearing on the merits.

Section 2 of the Review Act of 1950 (5 U.S.C. 1032(c)) confers jurisdiction on courts of appeals to review "final orders" of the Commission issued pursuant to the Shipping Act, 1916. Section 4 authorizes "any party aggrieved by a final order reviewable under this Act" to file "a petition to review such order" (5 U.S.C. 1034).

Petitioners are not "aggrieved by a final order reviewable under this Act." The only order issued here was one discontinuing the investigation (JA 67-68) and petitioners obviously are not complaining of that.^{28/}

^{27/} Of course, even where error or prejudice is shown it must be substantial before the courts will intervene to set aside agency action. Anchor Line Ltd. v. F.M.C., *supra*; Strachman v. Dulles, 96 App. D.C. 287, 225 F. 2d 938 (1955); Sum Oil Co. v. F.P.C., 256 F. 2d 233 (CA 5, 1958), cert. den. 358 U.S. 872 (1958).

^{28/} See next page.

Their challenge is directed to the Commission's finding of past violations. This Court has held, however, that a "court is given no authority to review a mere finding upon which no order is based." California Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 270, 239 F. 2d 426, 433 (1956) (quoting with approval from Carolina Aluminum Co. v. Federal Power Commission, 97 F. 2d 435, 436 (CA 4, 1938)); Federal Power Commission v. Hope Gas Co., 320 U.S. 591 (1944); United Airlines v. Civil Aeronautics Board, 97 U.S. App. D.C. 42, 288 F. 2d 13 (1955).

In the Hope Gas case, supra, the Federal Power Commission instituted an investigation to review the lawfulness of Hope's rates in order to determine the rates to be thereafter observed. In aid of state regulation and in response to the request of the City of Cleveland, the Commission made findings as to the lawfulness of past rates. The Supreme Court held these findings to be unreviewable because there, as here, they represented "the exercise solely of the function of investigation" (320 U.S. at p. 819). The Court stated in language applicable here (ibid.):

"They [the findings] are only a preliminary, interim step towards possible future action -- action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action."

28/ The only other order issued by the Commission was that of June 19, 1962, denying petitions for reconsideration (JA 70-72). To grant or deny a petition for reconsideration is wholly within the discretion of the Commission, and the refusal to grant discretionary relief is not subject to judicial review. Continental Oil Co. v. Federal Power Commission, 285 F. 2d 527 (CA 5, 1961) per curiam.

The instant case is not unlike Metropolitan Edison Co. v. Federal Power Commission, 169 F. 2d 719 (CA 3, 1948), cited and discussed in California Oregon Power, supra (99 U.S. App. D.C., at p. 270, fn. 9). In Metropolitan Edison the agency's opinion accompanying an order contained a finding that petitioners had been "in trespass" in maintaining its plant without a license. The court refused to review the finding, stating (at p. 725): "The Commission's statement, however, is not germane to any substantial issue presented for our determination. * * * The Commission has not attempted to impose any penalty on Metropolitan by reason of the facts last mentioned."^{29/}

As we have shown previously, petitioners erroneously contend the agency investigation was a "penal" proceeding (see Part III of this brief). In connection therewith, Farrell and Safmarine have also argued that the Commission has "exclusive primary jurisdiction to pass upon the conduct of common carriers by water" and its determination of a violation was "the necessary preliminary" to institution of the pending penalty suit against the companies in the Southern District of New York (fn. 3, supra). (Farrell Br. pp. 16, 23-24; Safmarine T.Br. 7a, 10, 24-25, 36). Similar argument was advanced by petitioners in opposition to the motion to dismiss. Their "aggravement," therefore, is that absent the Commission's report the penalty suit could not have been brought.

^{29/} Decisions such as United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), and Frozen Food Express v. United States, 351 U.S. 40 (1956), are clearly not controlling here. In each of these cases, the Commission's order either immediately precluded the company from doing something, or imposed, at once, new requirements upon its operations.

This argument is untenable. Petitioners attempt to support it with cases that dealt with the problem of accommodating the antitrust laws and the Shipping Act to determine to what extent the remedies prescribed in one were superseded by the other. No such problem exists here and the cases are inapposite.^{30/} The civil penalty suit is provided for by section 15 of the Shipping Act itself for violation of that section. The same is true of the civil penalties provided for other activity proscribed by the Act. There is nothing in the statute which makes liability to the penalty depend on a finding of violation by the Commission. Section 15 is clear and declares in pertinent part (Appendix A):

"Whoever violates any provision of this section . . . shall be liable to a penalty of not more than \$1,000 for each day such violation continues, to be recovered by the United States in a civil action."

As before noted, the determination whether to bring this action is exclusively within the province of the Attorney General or his designee (28 U.S.C. 507; 5 U.S.C. 310). It may be made whether or not there has been an administrative determination, and indeed, must in many cases be made without regard to any such determination or else the limitations period for bringing the penalty suit will expire (28 U.S.C. 2462). Moreover if the limitations period had expired here (as happened in the case of Dreyfus, who is not a petitioner here), or had there been no penalty suit

^{30/} U.S. Navigation Co., Inc. v. Cunard S.S. Co., 284 U.S. 474 (1932); Far East Conference v. United States, 342 U.S. 570 (1952); American Union Transport v. River Plate & Brazil Conferences, 126 F. Supp. 91 (1954), aff'd 222 F. 2d 369 (1955).

prescribed by Congress, petitioners could not even claim to be aggrieved by the Commission's exercise "solely of the function of investigation." Hope Gas case, supra.

An argument similar to petitioners, concerning the Walsh-Healy Act (49 U.S.C. 2036, as amended, 41 U.S.C. 35 et seq.), was made in Unexcelled Chemical Corp. v. United States, 345 U.S. 59 (1953). Under that Act, a person having a contract with the Government to furnish supplies in excess of a prescribed dollar amount is required to meet specified labor standards. Thus, child labor and convict labor are prohibited under the sanction of \$10 a day for each day any minor or convict is employed plus any underpayment of wages, payable as liquidated damages. These sums of money may be recovered in suits brought in the name of the United States by the Attorney General. The Secretary of Labor administers the Act, making investigations and findings and issuing complaints and holding hearings. (345 U.S. at p. 60).

One issue in Unexcelled Chemical was whether the action to recover liquidated damages was brought within the two-year period of limitations. There, just as here, "[t]he contention [was] that the cause of action accrues * * * only after [liability] is administratively determined * * *." (Id. at 65). There too, as here, "the administration of the Act [was] entrusted in large measure to" an agency (Secretary of Labor) with "broad investigating and hearing powers." Moreover, under that Act the Secretary of Labor's findings are conclusive in any court if supported by a preponderance of the evidence. Nevertheless, the Court concluded that accrual of the cause of action did not depend on an administrative

determination of liability but on the commission of acts constituting the violation. Referring to a number of cases dealing with "primary jurisdiction," including at least one petitioners have cited, the Court dismissed them as irrelevant. It said (id. at 66):

"The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings before the Secretary of Labor have been completed (Far East Conference v. United States, 342 U.S. 134; General American Tank Corp. v. El Dorado Terminal Co., 308 U.S. 422; United States v. Morgan, 307 U.S. 183) is a matter of judicial administration and of no relevancy here. The statutory liability accrued when the [acts constituting the violation occurred]".

See also United States v. Winegar, 254 F. 2d 693, 695-96 (CA 10, 1958).

In United States v. Waterman Steamship Corp., et al. (unreported, opinion of Chief Judge Ryan dated May 17, 1962 reprinted as Appendix C to this brief), No. 62 Cr. 247 (S.D.N.Y.), which was a penalty action brought by the Attorney General for violation of section 16 of the Shipping Act (46 U.S.C. 815), one of the defendants moved to dismiss on the ground that "primary jurisdiction" was in the Commission. The court denied the motion, stating that the doctrine of "primary jurisdiction" does not apply, as follows:

"Clearly, the institution of prosecution under this statute lies exclusively within the jurisdiction of the Attorney General and the adjudication and imposition of fine within the jurisdiction of this district court. It is not a question of the Commission having primary jurisdiction and ceding it to the courts - it never had jurisdiction over the offense charged in the Information; and this would be so even if the activities complained of were before it for administrative determination."

Plainly, therefore, petitioners should not be permitted to invoke this Court's review under the Review Act of 1950, supra, on the theory that the Commission's determination was a prerequisite to the Attorney General's penalty suit and hence they are "parties aggrieved" by such determination.

CONCLUSION

For the foregoing reasons, respondents submit that if the Court does not dismiss the petitions for review, it should affirm the Commission.

Respectfully submitted,

Lee Loevinger
Assistant Attorney General

James L. Pimper
General Counsel

Irwin A. Seibel
Attorney

Robert E. Mitchell
Deputy General Counsel

Department of Justice

Thomas D. Wilcox
Attorney

Federal Maritime Commission

Washington, D.C.

April 15, 1963

APPENDIX A

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

APPENDIX B
Copy of
Federal Maritime Board
Agreement No. 8054
Approved July 2, 1956

This Memorandum of Understanding between SEAS SHIPPING COMPANY, INC. and FARRELL LINES INCORPORATED, both being common carriers, operating regularly in and trade between U.S. Atlantic ports and various ports in Southwest, South and East Africa, including the Islands in the Indian Ocean (Reunion, Mauritius, the Comores and Seychelles and Madagascar) and the Islands of Ascension and St. Helena, both out and home, WITNESSETH: That said parties intend, by one or more representatives to confer with each other and discuss together from time to time the matter of rates, charges, classifications and related tariff matters appropriate and conformably with law and the interest of the foreign commerce of the United States to be charged or observed by them in the trade with such foreign ports covered by their service; and to agree on various rates, charges, classifications and related tariff matters, to be charged or observed by them, respectively, but with reservation of the right by each of them to alter for itself any rate, charge, classification, or related tariff matter thus agreed upon or theretofore in force upon first giving the other party at least forty eight hours' advance notice thereof.

Copies of all tariffs, supplements thereto and re-issues thereof, recording the rates, charges, classifications and related tariff matters of the parties hereto in the trade covered by this agreement, shall be filed promptly with the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

Any common carrier by water as defined in Section 1 of the Shipping Act, 1916, as amended, who has been regularly engaged as such common carrier in the trade between any U.S. ports and the foreign ports covered by this agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain a regular service between such ports, may hereafter become a party to this agreement by agreement of the then parties thereto and by signing this agreement or a counterpart thereof. In no instance shall admission to this agreement be denied an applicant except for just and reasonable cause. Prompt advice of any such denial, together with full statement of the reasons therefor shall be furnished the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended. Every application for admission to this agreement shall be acted upon promptly, and no such admission shall be effective until advice thereof has been sent to the aforementioned governmental agency.

Any party to this agreement may terminate its participation therein by giving 30 days' written notice to each of the other parties. A copy of any such notice shall be dispatched to the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

This Memorandum shall be filed promptly with the Federal Maritime Board for approval, which the undersigned parties hereby join in requesting, under Section 15 of the Shipping Act, 1916, as amended, and shall not be operative prior to such approval.

Dated: New York, N.Y.
March 27, 1956

SEAS SHIPPING COMPANY, INC.
/s/ WINTHROP O. COOK, President

FARRELL LINES INCORPORATED
/s/ JAMES A. FARRELL, JR., President

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

WATERMAN STEAMSHIP CORPORATION
CHARLES F. MONNINGER, ROSS PRODUCTS,
INC., IMPORT DISTRIBUTORS CORPORATION
and ALEXANDER MINTZ,

Defendants.

62 Cr. 247

"Endorsement
62 Cr. 247

"Title 46, Section 815, under which the defendants have been indicted, provides that a violation of Section 815 shall constitute a misdemeanor punishable by fine. Clearly, the institution of prosecution under this statute lies exclusively within the jurisdiction of the Attorney General and the adjudication and imposition of fine within the jurisdiction of the district court. It is not a question of the Commission having primary jurisdiction and ceding it to the courts - it never had jurisdiction over the offense charged in the Information; and this would be so even if the activities complained of were before it for administrative determination. In any event, there is nothing now before it.

"The motion to dismiss the Information or stay its prosecution is denied. See United States v. Pfizer, et al., 61 Cr. 772, S.D.N.Y., May 7, 1962; California v. Federal Power Commission, 30 U.S.L.W. 4293, 4/30/62.

"So ordered.

"Dated: May 17, 1962

/s/ Sylvester J. Ryan
U.S.D.J."

REPLY BRIEF FOR PETITIONER NEDLLOYD LINE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,218

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" and
KONINKLIJKE ROTTERDAMSCH LLOYD, N. V. as
participants in a joint steamship service under the trade name
"NEDLLOYD LINE",
Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME
COMMISSION,
Respondents.

No. 17,222

SOUTH AFRICAN MARINE CORPORATION, LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME
COMMISSION,
Respondents.

No. 17,224

FARRELL LINES INCORPORATED,
Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME
COMMISSION,
Respondents.

ON PETITION FOR REVIEW OF FEDERAL
MARITIME COMMISSION ORDER

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 15 1963

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REPLY BRIEF OF PETITIONER
NEDLLOYD LINE

Introductory

To a very considerable extent respondents' brief is little more than a restatement of the Commission's decision in revised and perhaps revitalized form. That decision was

discussed in detail in our principal brief, so that observations here may be largely confined to new positions taken.

Nevertheless, it is important to emphasize again that the Government's answering brief represents, in petitioner's judgment, an attempt to rationalize the position of a Congressional investigatory committee, to disavow the actions of the Commission's Public Counsel and of its Examiner, to establish a novel and *ex post facto* interpretation of Section 15 of the Shipping Act, 1916, and to disregard traditional rules of procedure—all in the course of what respondents would characterize as a mere investigatory proceeding.

It is likewise important to emphasize again those special features of Nedlloyd's operation which distinguish its position in the trade from that of the other carriers:

1. Nedlloyd's operation was a comparatively small one, inaugurated after other lines had become well established (JA 18-19; 188-9);

2. Nedlloyd's vessels did not participate in the outward trade to Africa from United States Atlantic or Gulf ports (JA 188-9; 197-8);

3. Nedlloyd's routing, as distinguished from all others, was not around the Cape of Good Hope but northward through the Red Sea and the Mediterranean, which made it largely uncompetitive with that of the other carriers (JA 101; 188-9; 197-8);

4. Nedlloyd's carryings were largely confined to about 10 items (JA 225);

5. Of the 10 principal items Nedlloyd transported, more than half were carried at rates either higher or lower than those of the other carriers (JA 225-6);

6. Nedlloyd instructed its New York agents not to enter into any agreement at all with other carriers, and special authority had to be obtained from abroad to enter into Agreement No. 8054 (JA 223);

7. The charges against Nedlloyd presented by the Hearing Counsel were confined to three items, as to which Nedlloyd's freedom from any responsibility was established (JA 72; see Main Brief, pp. 9-10); and

8. Nedlloyd's position was the subject of a special finding by the Hearing Examiner which clearly exonerated it from the charges made (JA 111).

At page 16 of their brief respondents have artfully attempted to characterize the agency proceeding in such a way as to make petitioners' arguments on appeal look frivolous.

For example, stress is laid on the fact that the carriers "portrayed the agency proceeding as a penal trial". This is true to the extent that petitioners emphasized the severity of the \$1,000 a day possible penalty under Section 15—a penalty virtually without precedent in any other statute—to justify their position they were all the more entitled to the procedural safeguards embodied in the Administrative Procedure Act and in the Commission's own regulations. Support for petitioners' position is found in *Boyd v. United States*, 116 U. S. 616.

Next, the carriers are charged with having "attacked the 'admissibility' of the evidence at length". This, too, is true, but it is difficult to understand why it should be a subject for criticism. What indeed is the purpose of having a quasi-judicial hearing unless the parties being investigated are entitled to claim the protection of those safeguards which, in their counsel's best judgment, are appropriate under the circumstances? One would infer from the respondents' comments that the carriers are somehow to be blamed for not "cooperating".

The carriers are also charged with having "professed not to know what Section 15 means". To this they may indeed plead guilty. However, in this respect they stand in good company. The then-Chairman of the former Fed-

eral Maritime Board admitted as much in the course of his testimony before the Celler Subcommittee. (See Main Brief, p. 16-17). Docket 882 was the first Section 15 proceeding instituted as a result of the admonitions of the Celler Committee and it was plain from the start that the newly constituted Federal Maritime Commission was in fact under considerable pressure to pour a new wine of interpretation into the old bottles of familiar statutory criteria. In view of strong criticisms leveled at the predecessor agency, it is scarcely to be wondered that the carriers should believe that this proceeding was brought with other than purely investigatory ends in view, and that the Commission was determined to use it, as indeed it has, as a vehicle for expounding a new and different construction of a statute enacted some 45 years before.

Then, too, respondents charge the carriers with professing not to know what the investigation involved, as though the carriers were somehow endowed with the clairvoyant ability to read the mind of whoever drafted the Commission's orders of investigation—orders phrased only in the broadest statutory terms and covering a period of six years.

At page 16 the petitioners are also said to have "denied any agreement to fix rates". So far as petitioner Nedlloyd is concerned, this is a correct statement, and, indeed, this is the heart of the present case. Nedlloyd does not deny that its representative did, upon occasion, discuss rates with other carriers in the trade or exchange rate information with them. Its position here, as before the Commission, is that this is not an activity proscribed by Section 15 of the Act. Nedlloyd does emphatically deny that its agents attended any rate meeting, as alleged at page 16 of respondents' brief. It likewise denies that it was ever told by Lykes that any arrangement to which it was a party ought to be filed with the Federal Maritime Board, as alleged at page 20 of respondents' brief. Nedlloyd also strongly challenges the statements appearing on page 24 of respondents' brief that it concurred in any agreement

to give 48 hours' notice of rate changes, and the record does not support respondents' further suggestion that such an agreement ought to be implied.

Absence of Agreement

Nedlloyd admits that many of its rates charged in the inbound trade were, as found by the Examiner, identical with those charged by other carriers (JA 225-6). This was the result of a deliberate policy on the part of its principals to follow the rates of the dominant carriers in the trade (JA 223)—a policy which respondents have not claimed as violative of Section 15. Instead, respondents dismiss Nedlloyd's explanation as "nonsense", perhaps on the theory that it is better to call a strong argument by a bad name than attempt to refute it.

In support of their claim that Nedlloyd's activities were based on an "agreement", rather than a policy of "follow the leader", respondents lay considerable stress upon the activities of a Mr. Phillips, who, it is claimed, "served as Nedlloyd's conduit to the other carriers, distributed rate proposals for 'concurrence' by all the carriers, and presided over meetings attended by representatives of Farrell, Safmarine, Lykes and Mormac, at which rates were reviewed in detail and agreed upon" (p. 23). Yet it is plain from respondents' own description of Mr. Phillips' activities that these are equally consonant with Nedlloyd's version of its own actions. Mr. Arend Drost testified that when he wanted to know what rates the other lines were charging he would communicate with Mr. Phillips in order to obtain this information (JA 188, 189, 190-1, 192). Any shipper in the trade could have done the same thing. It is significant that it is nowhere alleged, either in the Commission's report or in the respondents' brief, that Nedlloyd ever attended any of the meetings among the other carriers so often referred to.

The Nedlloyd documents included in the Joint Appendix (pp. 291-307) confirm the practice of its agent Java Pacific

Line to keep itself posted on the rate changes of others and to forward rate information on to its principals. The documents do not show that Nedlloyd participated in any pattern of concerted rate action; often as not its rates were different and there was disagreement, rather than cooperation. Moreover, some of the documents do not relate to the Africa—Atlantic and Gulf trade at all, but to the West Coast trade and trade from the East Indies, with which the Commission's investigation did not concern itself.

Viewed in their true perspective, the respondents' contentions with respect to Nedlloyd consist of nothing more than half-truths skillfully designed to embroil it with the activities of others so as to permit inferences which, whatever their validity with respect to other carriers in the trade, may not properly be drawn against this petitioner.

This tendency to treat all of the carriers alike infected the whole investigation from its inception. Constant and indiscriminate reference to "all the carriers", the "respondent lines", or simply "them", made it imperative that Nedlloyd, in order to establish the fact of its own special position, be given a clear and understandable statement of the matters charged against it as opposed to all the other carriers in the trade. The reluctance of the Commission and of its Public Counsel to provide such clarification led inevitably to the allegedly "needless squabbles" stigmatized so strongly in the Commission's report. However, unless "guilt by association" is to be substituted for traditional concepts of due process and fair play, the right of a respondent in a quasi-judicial administrative proceeding to obtain such particulars can scarcely be challenged.

Authorization to Agree

Nedlloyd's position in respect of authorization must be considered alone and apart from that of all others. The testimony is uncontradicted that its local agents were specifically forbidden to enter into any agreements with other

carriers. The Examiner so found, and his finding was not in any sense reversed by the Commission's opinion (see Principal Brief, p. 20). The instructions reflected not merely an aversion to formality, as respondents suggest (Brief, p. 33), but rather a deep-seated, far-reaching reluctance to enter into any contractual relation with its competitors. It was these policy limitations dictated to the local agents which necessitated the obtaining of special instructions for signing Agreement 8054. Far from being clothed with general authority, as respondents would now suggest (Brief, p. 34), Nedlloyd's agents were limited by precise instructions to follow generally the rate policies of the other carriers—the sensible and usual position of minor carriers entering in a limited fashion a trade in which the pattern has already been set by others. There seems to be some misapprehension on the part of respondents about the inability of steamship agents to carry on routine business without the power to make immediate rate changes (Brief, p. 34). Actually, that is the usual arrangement rather than the exception.

Full rate publicity is now specifically required by law (new amendment of Section 18(b) to the Shipping Act, 1916, enacted by Public Law 87-346, 46 U. S. Code § 817(b)). The Commission had not previously looked askance at the practice of carriers keeping themselves posted as to one another's rates. In fact, as recently as December 7, 1961, in Docket 883, *Unapproved Section 15 Agreements, West Coast South America Trade*, Pike & Fisher Shipping Regulation Reports, 545, 546a, it said:

“The respondents engaged in a series of inquiries concerning rates. These were usually prompted by requests from shippers for rate reductions or quotations. In most instances, the information which passed between respondents regarding these requests referred to rates already independently adopted, although they might not yet have been made effective. On a few occasions, it appears that there was some discussion of rates and rate considerations prior to

the decision on the rate in question by either conference, but this was not shown to be an established practice. . . . A cooperative 'spirit' does not quite achieve the status of an agreement or understanding or a cooperative working arrangement that would be included within the scope of Section 15."

The imaginary rate-making arrangement, conjured up in respondents' brief, is further embellished into a full-fledged cooperative working arrangement as to which the principals were fully posted and which indeed they nourished, approved and ratified. Interesting as this hypothesis may be, it has no basis in the record or by any facts cited in respondents' brief relating to Nedlloyd's activities.

The impact of the cases cited by Nedlloyd (Principal Brief, pp. 21-22) should not be disturbed by overly nice distinctions between civil and criminal penalties, relevant enough in some situations—but not here. *Boyd v. United States*, 116 U. S. 616; *Lees v. United States*, 150 U. S. 476. The case relied upon by respondents (Brief, p. 35), *United States v. Parfait Powder Puff Co.*, 163 F. 2d 1008 (CA 7th, 1947) relates to a situation completely different from the present one, namely the introduction into commerce of inherently dangerous goods, prohibited by the Food, Drug and Cosmetics Act. The liability of the principal there appears to have been predicated upon something in the nature of a warranty or guaranty which would provide broad protection to users of the commodity.

Carrying Out

Respondents' statement (Brief, pp. 37-8) that the Commission's discussion of this subject was mere academic dictum is not supported by what the Commission itself said (JA 55-61).

Here again respondents follow the fallacious procedure of assuming the guilt of petitioner Nedlloyd and then urging that the legal points which would preclude any such assump-

tion are therefore inconsequential. We have pointed out in detail in our main brief (p. 13) that, whatever may have been said of other respondents, there is nothing to establish any violation on the part of petitioner Nedlloyd, and the Examiner so found (JA 111). Even in the Commission's decision, the only inferences of Nedlloyd responsibility rest upon the unjustified and inaccurate lumping together of Nedlloyd with other respondents, operating on a different basis and against a different background. It is interesting to note that no record citations are offered for charges against Nedlloyd. The respondents state (Brief, pp. 38-39): "We shall not burden the Court with another recital of specifics", referring only to the Commission's opinion.

There can be no denying that the investigation was concerned with "carrying out". In this respect, respondents' footnote on page 20 of their brief, relating to the Commission's order, is misleading. The January 7, 1960 order inaugurating the proceeding (JA 1), the January 18, 1960 modifying order (JA 4), and the further order of January 22, 1960 (JA 6), all described the purpose of the Section 15 investigation as follows:

"It is ORDERED, that an investigation is hereby instituted to determine whether any of the persons named above have carried out before approval under said section 15 any agreements requiring such approval, in violation of said section 15; . . ."

The result is that, here again, Nedlloyd is confronted with an *ex post facto* change in the ground rules by virtue of which the Commission found the petitioner guilty of a serious infraction of law, which respondents would not minimize. It would require some rather surprising intellectual acrobatics to transform the earlier agency rulings mentioned by Nedlloyd (Main Brief, p. 17) into the *obiter dicta* to which respondents would now allude (Brief, p. 41). Certainly, the Commission's predecessors intended that carriers should be guided by their observations; Chairman Morse testified to that effect, and the law was changed to

cover the point. The reference to the antitrust law (Brief, pp. 40-41) would tend to emphasize Nedlloyd's point. For under the antitrust law (15 U. S. C. 1), as under Section 15 of the Shipping Act *after* the 1961 amendment, effectuation is not required.

The Commission's almost admitted reversal of position, so prejudicial to the interests of this petitioner, creates an injustice which should not appeal to the Court.

Due Process and Evidentiary Errors

However much respondents may seek to belittle the Commission's activities in the proceeding below (brief, pp. 43-7), the fact remains that the investigation was inaugurated and carried out pursuant to Section 15 of the Shipping Act, 1916, which provides an exceedingly heavy penalty for its violation. The fact also remains that no reason has been given for instituting such a proceeding long after discontinuance of the acts complained of, other than the obvious one of prosecution and punishment.* Finally, as the result of its findings, the Commission immediately referred the matter to the Department of Justice, and the Department thereafter began a civil action to collect the penalties.

The parties charged in these and any other proceedings are entitled to know the substance of the matters with which the proceeding is to be concerned. This is what Nedlloyd is complaining of. Its position is fully stated in its principal brief (pp. 8-13). Nedlloyd in particular was not only uninformed, it was affirmatively misled.

* It is interesting to note that in Docket 870, *Pacific Coast European Conference—Exclusive Patronage Contracts* the Commission under date of March 28, 1963 served its dismissal order, in which it stated: "Moreover, so far as the possible past violations of section 15 are concerned, we are of the opinion that no sound or useful regulatory purpose would be accomplished by further pursuing the instant proceeding in view of the enactment of Public Laws 85-626, 86-542, 87-75, 87-252 and 87-346."

The Commission here for the first time disavows the activities of its Public Counsel, who—at the request of the carriers and with the approval of the Hearing Examiner—sought to provide the information to which the carriers were entitled and upon which they relied. The Commission, long after the case was closed, decided: “We think it is clear that the practice should be discontinued.” (JA 24) Not only this, but the Commission would go so far as to say that the carriers should not even rely on its own inaugurating orders (see footnote, JA 58-9) since it admitted that they lacked precision. This of itself provides justification for the particulars which the carriers requested.

In respect of the evidence, even if the Commission were correct in its finding that some documents were improperly rejected, it does not follow that each and every one should have been let in, as the Commission found and respondents would now argue. Great emphasis is placed upon the fact that the documents came from the carriers’ files. While this is generally correct, it does not follow that every document is admissible evidence against all other carrier respondents. While statements in such documents may or may not be an admission against the carrier from whose files the documents are taken, it is clearly hearsay—and often hearsay on hearsay and from most unreliable sources—as against another carrier. This is particularly true in the case of Nedlloyd, whose interests are so basically and widely different from those of the other carriers. Yet, this important and critical point seems wholly overlooked by the Commission and unhappily now by the respondents in their brief.

The two exhibits to which the Commission attached the most importance with respect to Nedlloyd were Exhibits 124 and 125 (JA 38, 43). These had been rejected on the ground that the information contained in them came from Mr. Phillips, the Conference Secretary. Phillips is then described as the agent of Farrell, which implies a good deal of elasticity in interpreting agency, but he was certainly not

the agent of Nedlloyd. Most importantly, Phillips was readily available at all times throughout the hearing and, if the Commission was interested in making a complete and accurate record, it could readily enough have called him as a witness.

One of the prime difficulties in connection with the admission of documents was the failure to offer them into evidence until all of the testimony was in and the record otherwise closed. This was a point to which Nedlloyd took immediate and vigorous objection (JA 148). The failure to follow the procedure demanded meant that cross-examination on the documents mentioned, but not offered, would be fairly purposeless and in most cases was not undertaken.

The procedural and evidentiary errors were numerous and serious. They cannot be offset or discounted by reference to the time between the inauguration of the proceeding and the first hearing or the time between the hearings, as respondents would now suggest (brief, pp. 47-8). It is unfair and inaccurate to say—as do respondents (brief, p. 53)—that petitioners nowhere really contest the accuracy of the documents. Respondent Nedlloyd does contest the accuracy of the documents and has done so from the beginning (see particularly its principal brief, pp. 20-29).

There is nothing in this Court's as yet unreported decision in *Hohenberg Brothers Co. v. Federal Maritime Commission* running counter to our observations here as respondents would suggest (Brief, p. 52). That decision, found in Pike & Fisher's Shipping Regulation Reports, p. 20,371, indicates that the controversy related to the construction of Section 16 of the Shipping Act, 1916 (not Section 15), and there is nothing in the decision suggesting or indicating that it turned on any question of evidence.

Reviewability

On September 26, 1962 respondent moved for a dismissal of the review petitions on the ground that there was no "final" administrative order. Both sides submitted memo-

randa on the question; the Court heard oral argument and on December 17 entered a *per curiam* order denying the motion "without prejudice to renewal at the time of the hearing on the merits".

Point IV of respondents' answering brief appears to have been added, albeit somewhat half-heartedly, in a renewed effort to persuade the Court that it should refuse to review the Commission's action because the administrative findings were merely the result of an "investigation". Indeed, pages 55-57 of their present brief constitute an almost word-for-word repetition of the contentions previously advanced in support of this proposition.

Rather than lengthen this reply brief by further duplication of arguments already made, respondent Nedlloyd respectfully invites this Court's attention to the memorandum filed on its behalf on November 14, 1962 (reprinted at JA 130-40) in which the respondents' contentions were refuted. As was emphasized there, the true question is not as to the label which the Commission may have affixed to what it did, but "a realistic appraisal of the consequences of such action", as this Court noted in *Isbrandtsen Co. Inc. v. United States*, 93 U. S. App. D. C. 293, 211 F. 2d 51, 55 (1954).

At pages 59-60 of their present brief, respondents place considerable reliance on a case not previously cited by them—*Unexcelled Chemical Corp. v. United States*, 345 U. S. 59 (1953). In that decision the Supreme Court dismissed a Government action for liquidated damages for violation of the Walsh-Healy Act on the ground that it had not been commenced within the two-year limitation period contained in the 1947 Portal-to-Portal Act. The respondents argue from this that, whether or not there has been an administrative determination, the Attorney General could bring an action for a penalty under Section 15 of the Shipping Act so as to prevent the statute of limitations from running out. That is not an issue before this Court. Even if true, it does not undermine the rationale of the primary jurisdiction doctrine. As the Supreme Court noted in the

portion of the *Unexcelled Chemical Corp.* opinion quoted at page 60 of respondents' brief, to allow an action to be brought for the purpose of tolling the statute of limitations involves considerations totally different from the principles of "judicial administration" pursuant to which a court defers decision until the administrative proceedings have been completed. Nor does this judicial restraint depend upon whether or not the agency is empowered to afford the relief sought in the court proceeding. This distinction was noted in the Supreme Court's recent decision in *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.* (November 19, 1962), 371 U. S. 84, 88-89, where the Court said:

"Indeed, the doctrine of primary jurisdiction is designed to apply 'where a claim is originally cognizable in the courts, and . . . enforcement of the claim requires the resolution of issues . . . placed within the special competence of an administrative body . . . ' *United States v. Western Pacific R. Co.*, 352 U. S. 59, 64 (1956); see Davis, *Administrative Law Treatise* Sec. 19.01 (1958). The practice of the Commission in making such determination in the first instance, even though it has no power to award reparations in a given case, has long been exercised, . . . and is supported by a long line of cases."

Precisely the same reasoning is applicable to the instant case, as the Government by its conduct has tacitly recognized. The matters which were the subject of the Commission's Docket 882, and which are under review here, have been public knowledge for more than three years, ever since the so-called Celler Committee hearings were held in October, 1959. (See Hearings before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, Eighty-Sixth Cong., First Sess., Part 1, Volume IV.) Yet the Department of Justice postponed the institution of its civil action in New York against the carriers in the African trade to recover statutory penalties until September 20, 1962, i.e. *after* the Commission had already found violations of Section 15 of the Shipping Act and after peti-

tions to review those findings had already been filed in this Court.

It is this petitioner's contention that the Federal Maritime Commission's order should be reviewed here because this proceeding is the legal culmination of a regulatory process established by Congress and implemented by the courts. The vital consideration is that no prejudicial agency action escape appropriate judicial review, which alone is capable of correcting fundamental errors of substance and procedure before they achieve the status of binding precedent. This is particularly true where, as in the instant case, the agency is admittedly breaking new ground in both directions.

Finally at page 60 of their brief, respondents rely on an unpublished memorandum decision in which the United States District Court for the Southern District of New York ruled that the Federal Maritime Commission had no jurisdiction over a *criminal* information charging violation of Section 16 of the Shipping Act, a Section which prohibits unjustly preferential treatment of shippers. Whatever may have been the facts of that case (and they are nowhere set forth in the short opinion annexed as Appendix C to the Government's brief), it is clear that they did not involve the important policy considerations under Section 15 which are present here. In any event, that ruling is, on its face, contradictory of the same Court's statement in *Rivoli Trucking Corp. v. New York Shipping Ass'n*, 167 F. Supp. 940, 942 (S. D. N. Y., 1956) that "Primary proceedings charging a defendant, who is subject to the Shipping Act, with a violation of the Shipping Act must be brought before the Federal Maritime Board". (See also the court's later opinion reported at 1962 AMC 2482) That this is true of suits instituted by the United States was established in *Far East Conference v. United States*, 342 U. S. 570 (1952), and in *United States v. Alaska Steamship Company*, 110 F. Supp. 104 (D. Wash., 1952), just as *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474

(1932) and *American Union Transport Inc. v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (S. D. N. Y. 1954), affirmed 222 F. 2d 369, applied the same rule in respect of actions brought by private parties.

CONCLUSION

The Decision of the Federal Maritime Commission Should be Reversed and Set Aside and Petitioner Should Have Such Other and Further Relief as to the Court May Seem Just.

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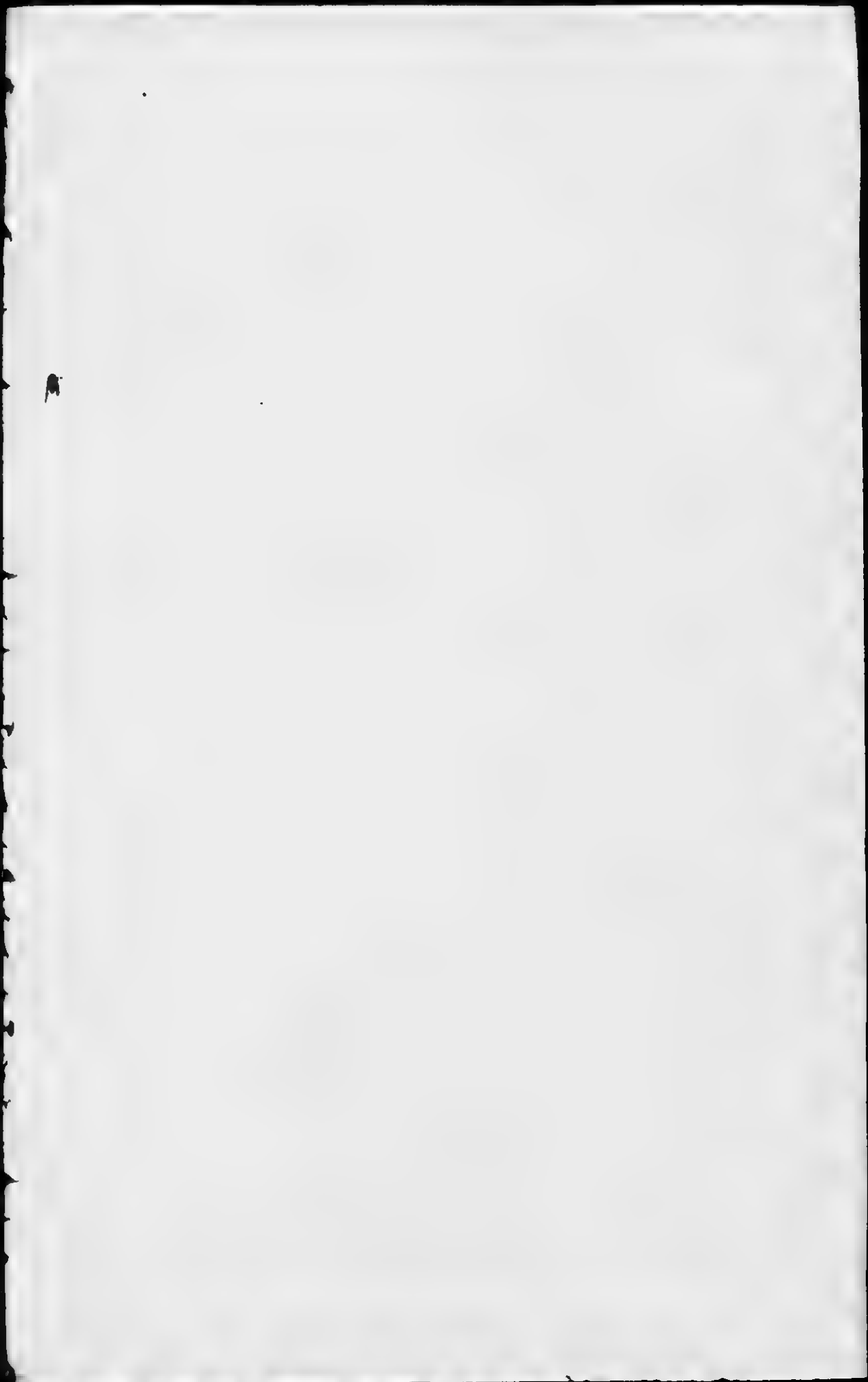
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April 15, 1963



REPLY BRIEF FOR PETITIONER

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—against—

UNITED STATES OF AMERICA AND FEDERAL
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Respondents.

**PETITION TO REVIEW ORDERS OF THE FEDERAL
MARITIME COMMISSION**

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FILED APR 15 1963

Nathan J. Paulson
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*Cases chiefly relied upon are marked by asterisks.

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Respondents.

No. 17,222

**Petition to Review Orders of the Federal Maritime Com-
mission**

**REPLY BRIEF FOR SOUTH AFRICAN MARINE CORPORA-
TION, LTD., PETITIONER**

Little comment is required with respect to the brief filed on behalf of the respondents. The Court, however, is asked to keep in mind that although in many respects the case of the petitioners is identical that is not true in all instances.

The petitioner Farrell Lines Incorporated is a U. S. flag Line, operating a common carrier service from and to North Atlantic ports to South Africa.

Safmarine operated a common carrier service to South Africa. It did not operate a common carrier service from South Africa (Respondents' Brief p. 6).

Nedlloyd operated a common carrier service from South African ports to the U. S. A., but did not operate a common carrier service to South Africa. Therefore, Safmarine is

not concerned with any agreements which relate to any inbound traffic, since it did not operate its vessels in that trade. Also, Safmarine made no agreements with Nedlloyd, since these two carriers were operating in different trades.

Attention also is called to the fact that the Examiner issued a recommended decision finding that none of the carriers concerned had violated Section 15 of the Shipping Act, 1916 (JA 87). The Examiner's report was based on oral testimony adduced before him. The Federal Maritime Commission, it is true, reversed the Examiner's report, but this reversal was based on a wholesale admission of every single writing which had been at any time marked during the hearings. Only 3 Exhibits coming from the files of Safmarine are cited by the Commission and none of these Exhibits showed any violation of statute by Safmarine (JA 34, 40, 42). The Exhibits on which the Commission relied came from the files of the five other steamship companies which were engaged in the South African trade at various times.

Respondent's Brief p. 13, attempts to justify this extraordinary procedure on the theory that the Commission was merely conducting an investigation for purposes of regulation.

This attitude of the respondents and the Commission is, we submit, illogical. While the Commission states that this proceeding has no criminal or penal aspects and that it is merely informatory and regulative, yet its decision concludes with a finding that the Lines against whom the inquiry was directed had, prior to Sept. 10, 1958, violated the law.

We submit that the proceeding must be one thing or the other. If it is intended merely to gather evidence as to possible violations or for regulation, then all documents, whether or not of a hearsay nature, may be received.

On the other hand when Public Counsel are directed by the Commission to obtain a finding of law violation, then

time-honored rules of evidence should be followed, and there should not be received in evidence every scrap of paper which has at one time or another been referred to.

The respondents' brief, at page 13, states:

"The proceeding was an administrative investigation with a clear regulatory purpose, not a penal trial * * * It (the Commission) regulates present or future conduct * * *."

In the present instance no regulation was involved. The Commission's decision was served on April 10, 1962. The Commission admitted in its decision that all violations had, in any event, ceased on September 10, 1958, when Safmarine became a member of Agreement No. 8054. Accordingly, the Commission decided that there were no agreements on which an order could be entered, because there was nothing to "regulate." The decision was not for the purpose of regulating forbidden activities which had terminated three years and seven months previously. In so far as "regulation" is concerned the decision was academic.

Where no sound or useful regulatory purpose could be accomplished the Commission recently properly dismissed a proceeding involving past violations of Section 15. *Docket 870, Pacific Coast European Conference—Exclusive Patronage Contracts* decided March 19, 1963.

Mr. McGrath, Vice President of States Marine Corporation, General Agent of Safmarine during the period under investigation, vigorously denied that he had entered into any agreement (J. A. 172, 173, 174, 177).

Respondents cite many cases, but these cases are all distinguishable on their facts, and it would swell this reply brief to an enormous length and far exceed the 25 pages allowed by the Rule if we were to attempt to point out the difference in the facts between the cases cited and the situation of Safmarine in the case at Bar.

The truth of the matter is, as is shown by the testimony, that Safmarine operated in this trade up until the date when it became a member of Agreement No. 8054, without making agreements with anyone; it sought to ascertain the rates which other carriers were charging and it was its policy not to deviate to any serious extent from the rates of the other carriers; also, it sometimes gave information as to its rates, but this is unimportant, because Safmarine's rates were required to be filed with the Federal Maritime Board, and were so filed, so that they were a matter of public record.

At page 33, respondents' brief asserts that Safmarine and Nedlloyd are responsible for the acts of their agents.

This reply brief is not, of course, concerned with Nedlloyd. We do, however, take the position that Safmarine cannot be made responsible for a violation of Section 15 of the Shipping Act because that violation, if there was a violation, was committed by its agent and without the knowledge or participation of South African Marine Corporation, Ltd., the principal, which had its home office in Capetown, South Africa.

At pages 33 and 34, counsel for respondents is guilty of a grave error in referring (in the footnote) to a conversation "with Messrs. Mercer of Safmarine and Mr. McGrath of States Marine."

Mr. Mercer was not an officer of Safmarine, but was President of States Marine (J. A. 148, 168). The conversation, if it took place, was solely with the agent.

Exhibit 144, which is quoted from at page 34, is one of a series of "orphan" Exhibits, which were produced from the files of Dreyfus Lines, and were, supposedly, written by an employee of Dreyfus to an address in Paris. Neither the writer nor the addressee of the letter was called as a witness. The letter was excluded by the Examiner and should also have been excluded by the Commission as the rankest

kind of unprobative hearsay. Indeed, the text of the letter does not show that any agreement was ever made, even by States Marine, the agent.

Also, in the footnote at page 34, reference is made to Mr. Buser, who was present at some "rate meetings" at the office of the Conference for the purpose of obtaining information.

There is a grievous error in respondents' Brief in stating that Mr. Buser in "May 1958 was employed directly by Safmarine" (p. 34 note). This mistake results from an obvious typographical error in the transcript at J. A. 185 where Mr. Buser is reported as having said that he had been with Safmarine (N. Y.) since May 1958. In fact, Mr. Buser remained in the employ of States Marine until June 1, 1959, when the agency agreement between Safmarine and States Marine terminated (J. A. 168, 179, 182, 183, 184, 199, 228, 229). At that time a new corporation, known as South African Marine Corporation (N. Y.), took over the agency, and Mr. Buser became an officer of the new company, and took over the rate-making authority previously exercised by McGrath of States Marine (J. A. 198, 199). The mere fact that Mr. Buser had some rate-making authority in June of 1959 certainly does not show that more than one year previously he had such authority, nor that he agreed to rate alterations discussed at the Conference meetings.

In petitioner's main brief, at page 17, the case of *United States v. Food & Grocery Bureau of Southern California*, 43 F. Supp. 966, at page 971, was cited, where it was held that, although the agent's conduct was a violation of the Sherman Act, this did not render the principal liable.

Both the Sherman Act and Section 15 of the Shipping Act are aimed at agreements in restraint of trade, and the same construction should apply. Supporting *United States v. Food & Grocery Bureau* are the further decisions of

Nobile v. United States, 284 Fed. 253, Third Circuit, and *Paschen v. United States*, 70 F. 2d 491, Seventh Circuit.

The only case cited by the respondents on this point, at page 35 of their brief, is *United States v. Parfait Powder Puff Co.*, 163 F. 2d 1008, which involved an infraction of the pure food and drug laws. It may be that under the policy of laws which regulate the distribution of foodstuffs to the public a violation by the agent is attributable to the principal.

At pages 36 to 42, respondents' brief claims that the carrying out of an agreement illegal under Section 15 need not be proved; that the mere mental act of making such an agreement is sufficient.

Section 15 may be ambiguous on this point but, if it is, it is subject to the rule of strict construction. *Yates v. United States*, 354 U. S. 298, 304.

At page 41, the respondents refer to the prior decisions of the Federal Maritime Board which held that the offense was in the carrying out of an agreement and that no offense was committed by making an agreement which was never carried out. The uniform rule, which was applied until the Commission's decision in the proceeding now under review, was that "effectuation" was necessary to constitute a violation. See *Safmarine's* main brief, page 11. The respondents' brief quotes a part of Mr. Morse's testimony (respondents' brief, page 41) in which Mr. Morse stated that his "personal view" was that effectuation was unnecessary. The fact that Mr. Morse had a "personal view" different from that of the Federal Maritime Board merely strengthens petitioners' position. If Mr. Morse privately dissented from the view of the Board, he nevertheless acquiesced in the rule as laid down by the other Board members.

As pointed out in *Safmarine's* main brief page 11, statutes are to be construed in accordance with the long

established practice of the Governmental authority which is charged with their enforcement. *Pennell v. Philadelphia & Reading Railway*, 231 U. S. 675, 680; *Inland Waterways Corp. v. Young*, 309 U. S. 517, 524. And as further pointed out in Safmarine's main brief, the retroactive construction given to the statute by the Federal Maritime Commission in a decision filed more than four years after the alleged violations had ceased is abhorrent to our system of law and at variance with the principles of the Administrative Procedure Act. *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F. 2d 141, 149, 150 (C. A. 9); *National Labor Relations Board v. Mall Tool Co.*, 119 F. 2d 700 (C. A. 7).

Even more striking is the fact that the Board's order of January 7, 1960, which initiated this proceeding provided for an investigation to determine whether the respondents had "carried out" agreements which required filing under Sect. 15 (J. A. 2). Now, the Commission finds that the respondents violated Sect. 15 not by "carrying out" agreements but merely by entering into them. This is a variance from the Board's order and a complete change from the specification which the petitioner was required to meet.

Respondents further contend that the question of whether proof of "carrying out" is required does not arise because, they assert, there was such proof. They do not, and cannot, cite parts of the record which show carrying out (Respondents' Brief pp. 38, 39). They refer to tariffs but no tariffs are in evidence. The proof is lacking because it could not be supplied.

The Commission's decision is based on an alleged continual violation commencing in 1954 and continuing until September 10, 1958, when Safmarine signed agreement #8054 (J. A. 50).

Assuming for argument's sake, but not admitting, that there was *some* evidence that Safmarine's conduct prior to

September 10, 1958, may have justified a finding that, on specific occasions agreements that should have been filed were entered into, there is certainly a complete absence of evidence that such unfiled agreements were continuously carried out by Safmarine from 1954 until September 10, 1958. Any finding to the contrary rests on guess-work and speculation.

Consequently the Commission's finding that Safmarine continuously violated Section 15 from 1954 to September 10, 1958, must rest, if at all, on the theory that a violation occurred even if the alleged agreements were never carried out.

ANSWERING RESPONDENTS' POINT IV THAT PETITIONERS ARE NOT PARTIES AGGRIEVED BY THE COMMISSION'S FINDINGS OF PAST VIOLATIONS

On pp. 55-61 respondents' brief reargues the point raised by its motion of September 26, 1962, to have the petitions dismissed on the ground that the Commission's order of April 10, 1962, and its subsequent order of June 19, 1962, were not final orders reviewable under the Hobbs Act (5 U. S. C. A. § 1034). The same question is raised by the petition filed by Nedlloyd and Farrell Lines.

Respondents' arguments have already been answered in the brief on behalf of petitioners filed in opposition to the motion to dismiss (J. A. 130-139). Respondents once again cite cases involving the Federal Power Commission in which it was held that a Court need not review a mere incidental finding of fact upon which no order was based.

The present proceeding did not involve a mere incidental finding of fact. This was an investigation instituted under Section 22 of the Shipping Act having as its objective from the outset the determination of whether or not the petitioners violated Section 15 of the Shipping Act. The order

of April 10, 1962, embodied the ultimate findings and conclusions of the Commission and ended the proceeding. This order fixed a legal relationship among the petitioners which, by the test outlined by the Supreme Court of the United States in *Chicago & Southern Airlines v. Waterman Steamship*, 333 U. S. 103, at p. 113, makes it reviewable.

Respondents are mistaken in asserting (Brief, p. 57) that Safmarine claims that if there had been no order of the Commission the penalty suit could not have been brought.

The result of the authorities appears to be that the penalty suit could have been brought but the suit would have had to be stayed until the proceeding before the Commission was finished. Where the petitioners were aggrieved was in the fact that the Commission found that there was a violation of Section 15 and referred the matter to the Justice Department with the result that the penalty suit was instituted. It is the duality of finding and referral which has caused damage to Safmarine. The Shipping Act is not a new statute and the Supreme Court has many times held that the rule of "primary jurisdiction" applies when the controversy falls within the ambit of the Maritime Commission's jurisdiction. *United States Navigation Co., Inc. v. Cunard S. S. Co., Ltd.*, 284 U. S. 475; *Far East Conference v. United States*, 342 U. S. 570.

The principal of primary jurisdiction goes back to the decision in *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U. S. 426, which was applied to a controversy involving the Federal Maritime Board in *Far East Conference v. United States*, 342 U. S. 570, a suit brought by the United States against a number of steamship companies to enjoin alleged violations of the Sherman Antitrust Act.

In pointing out the reason for requiring a preliminary decision by the Federal Maritime Board, the Court said, page 574:

"The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."

And in concluding its opinion the Court said, page 576:

"Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the District Court docket pending the Board's action, *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 432-433; *El Dorado Oil Works v. United States*, 328 U. S. 12, 17; see *United States v. Interstate Commerce Commission*, *supra*, at 465, n. 12, or order dismissal of the proceeding brought in the District Court. As distinguished from the situation presented by the first *El Dorado* case, *supra*, which was a contract action raising only incidentally a question proper for initial administrative decision, the present case involves questions within the general scope of the Maritime Board's jurisdiction."

And after some further discussion the Supreme Court said, page 577:

"We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate."

The *Far East Conference* case shows that the courts are entitled to exercise discretion as to whether to dismiss or order the court case retained on the District Court docket pending the Agency's action. If, therefore, the Department of Justice were to advance any compelling reasons indicating that the case should not be dismissed, but retained, an order to that effect would be granted.

The fact that the suit could have been brought and stayed does not affect the position of Safmarine that it is a party "aggrieved" by the Commission's order. The finding of statutory violation by the Commission is reason enough for Safmarine and the other petitioners to feel "aggrieved".

CONCLUSION

THE FEDERAL MARITIME COMMISSION SHOULD BE DIRECTED TO REVERSE AND ANNUL ITS DECISION FINDING THAT PETITIONER, SOUTH AFRICAN MARINE CORPORATION, LTD., VIOLATED SECTION 15 OF THE SHIPPING ACT, 1916 (46 U. S. C. 814) WITH SUCH OTHER OR FURTHER RELIEF TO PETITIONER AS TO THE COURT MAY SEEM JUST.

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Dated: New York, N. Y., April 15, 1963.

CERTIFICATE

I hereby certify that on this 15th day of April, 1963, I served a copy of the foregoing Brief For Petitioner South African Marine Corporation, Ltd. upon all parties to these proceedings by placing a copy thereof in the U. S. mail, first class, postage prepaid, properly addressed to the following counsel for said parties:

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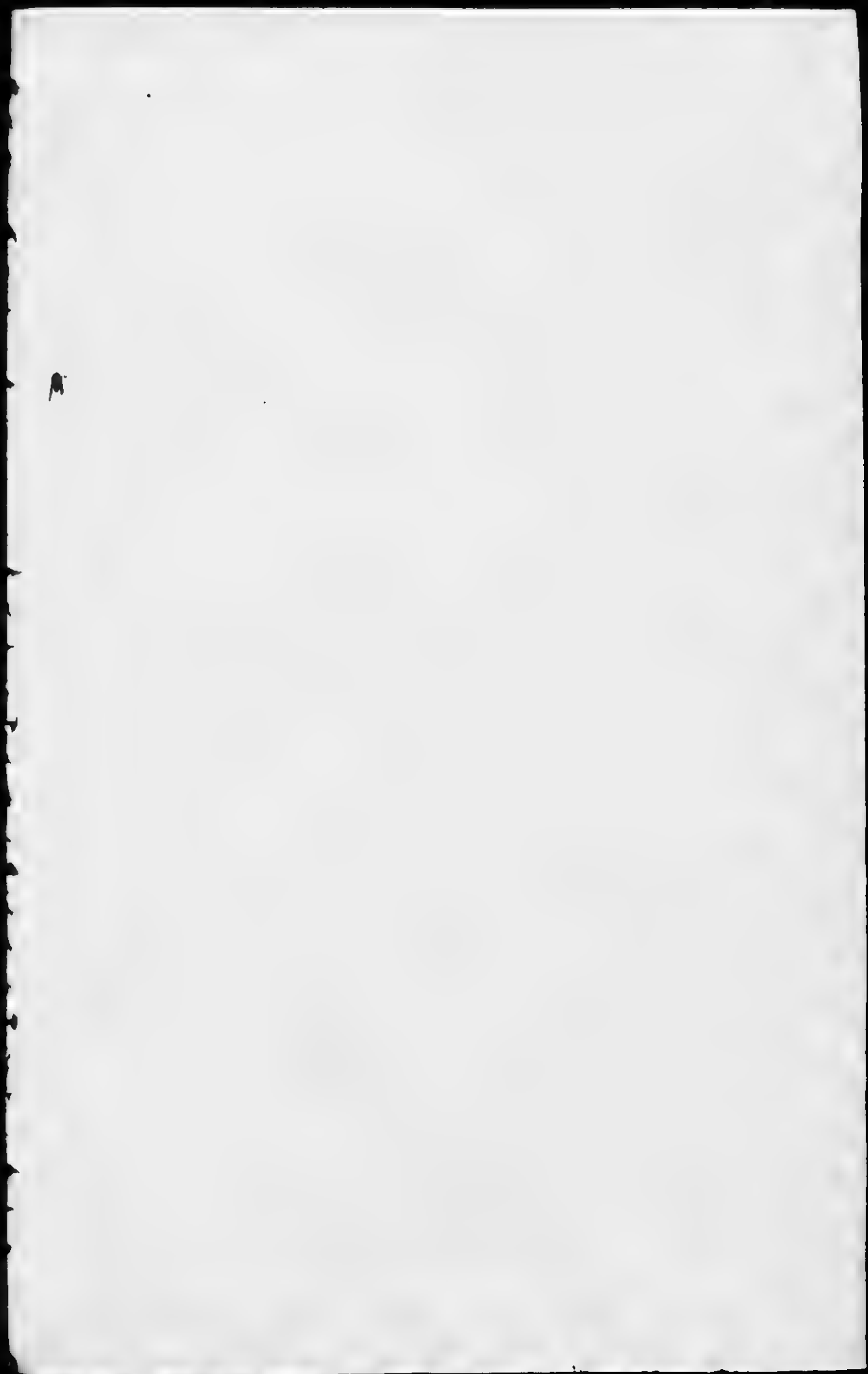
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REPLY BRIEF OF PETITIONER.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 17224

Consolidated with Nos. 17,218 and 17,222

FARRELL LINES INCORPORATED,
Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF FEDERAL
MARITIME COMMISSION ORDER.

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 15 1963

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• (Cases particularly relied on are marked with an asterisk).

I

The points asserted in Respondents' brief were, with the exception noted below, anticipated and covered in Petitioner's opening brief. The observation should be made, moreover, that throughout Respondents' brief assertions are frequently made without record or case citation to support them, and it must be further noted that Respondents make no attempt to meet Petitioner's argument that the Commission erred in holding that the companies violated Section 15 of the Shipper's Act on the ground that Agreement 8054 failed to disclose all the parties thereto.

II

Respondents in their brief have again asserted the argument, made earlier in their Motion to Dismiss filed September 26, 1962, which this court denied, that the Petitioners lack standing as not being "parties aggrieved". The argument and cases cited are essentially identical to the argument and cases set forth in the earlier motion and, accordingly, with respect thereto, Petitioner respectfully incorporates its reply to that motion dated November 14, 1962. Petitioners have cited two new cases construing the Walsh-Healy Act (49 U. S. C. 2036, as amended, 41 U. S. C. 35 *et seq.*), *Unexcelled Chemical Corp. v. United States*, 345 U. S. 59 (1953) and *United States v. Winegar*, 254 F. 2d 693, 695-96 (CA 10, 1958), and an unreported opinion of Chief Judge Ryan, dated May 17, 1962, in *United States v. Waterman Steamship Corp.* No. 62 Cr. 247 (S. D. N. Y.), involving a criminal prosecution under Section 16 of the Shipping Act, 1916 (46 U. S. C. 815). None of these cases involved the question of standing to obtain review. Whatever may be the proper relationship under the Walsh-Healy Act between a procedure for fact finding by the Secretary of Labor and a suit by the United States to collect liquidated damages for breach of a contract to which it is a party, or under Section 16 of the Shipping Act, the Supreme Court in *United States Navigation Inc. v. Cunard Steamship Company*, 284 U. S. 774 (1932) and in *Far East*

Conference v. United States, 342 U. S. 570 (1952) has determined that for cases arising under Section 15 of the Shipping Act exclusive primary jurisdiction is vested in the Federal Maritime Commission and their determination is a necessary step before any further action by the United States.

CONCLUSION

For the reasons set forth in our opening brief and in this reply brief, Petitioner prays that this Court: (1) declare invalid and set aside and annul the Commission's order and report of April 9, 1962 insofar as said order and report relate to alleged violations by Petitioner of Section 15 of the Act; (2) order the Commission to withdraw its reference of the facts and findings of said order and report from the Department of Justice; and (3) grant such other and further relief as the Court may deem proper.

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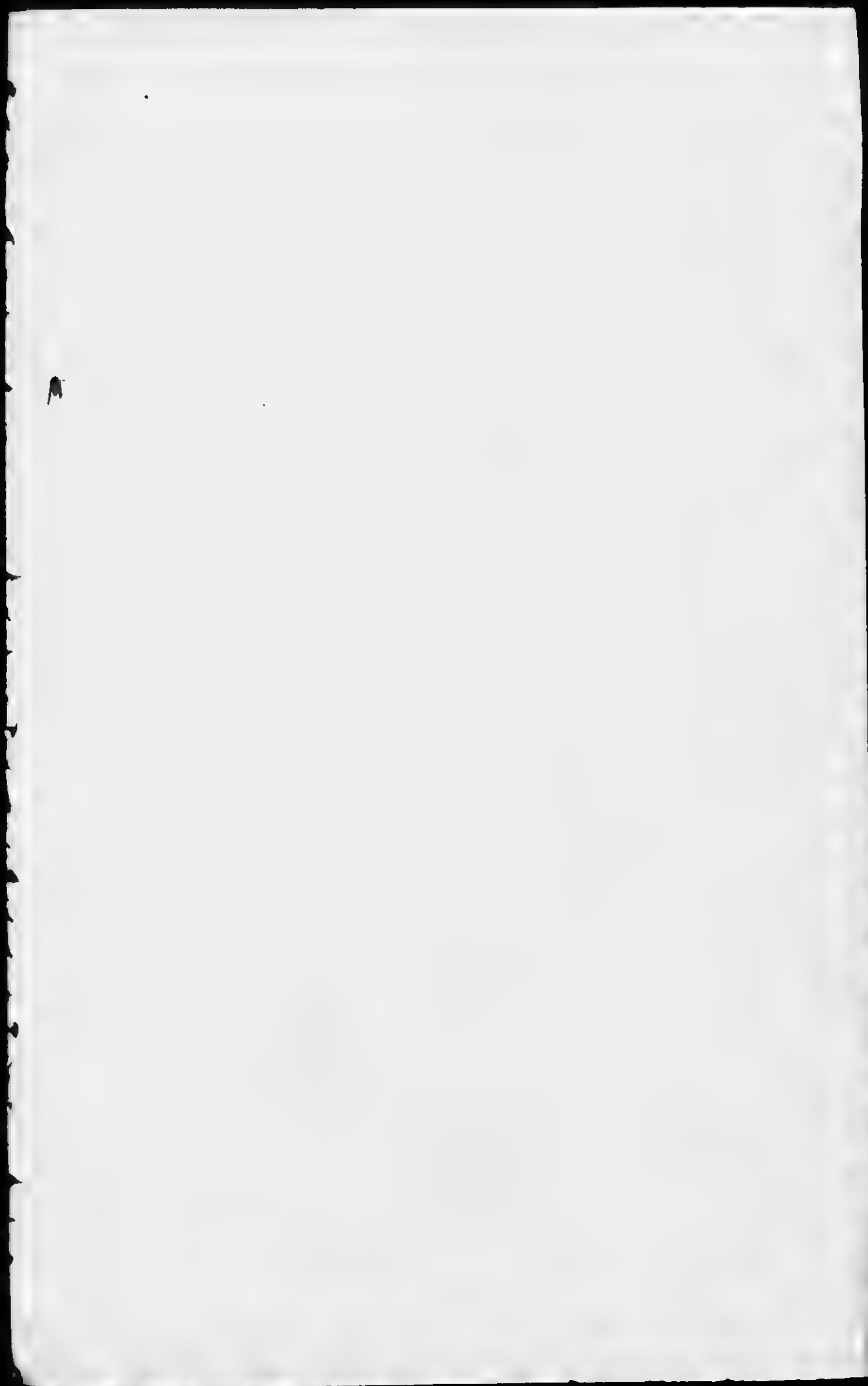
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JOINT APPENDIX

IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 17,218

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" and KONINKLIJKE ROTTERDAMSCH LLOYD, N. V., as participants in a joint steamship service under the trade name "NEDLLOYD LINE",

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,
Respondents.

No. 17,222

SOUTH AFRICAN MARINE CORPORATION, LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,
Respondents.

No. 17,224

FARRELL LINES INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,
Respondents.

**CONSOLIDATED PETITIONS TO REVIEW AN ORDER OF THE
FEDERAL MARITIME COMMISSION**

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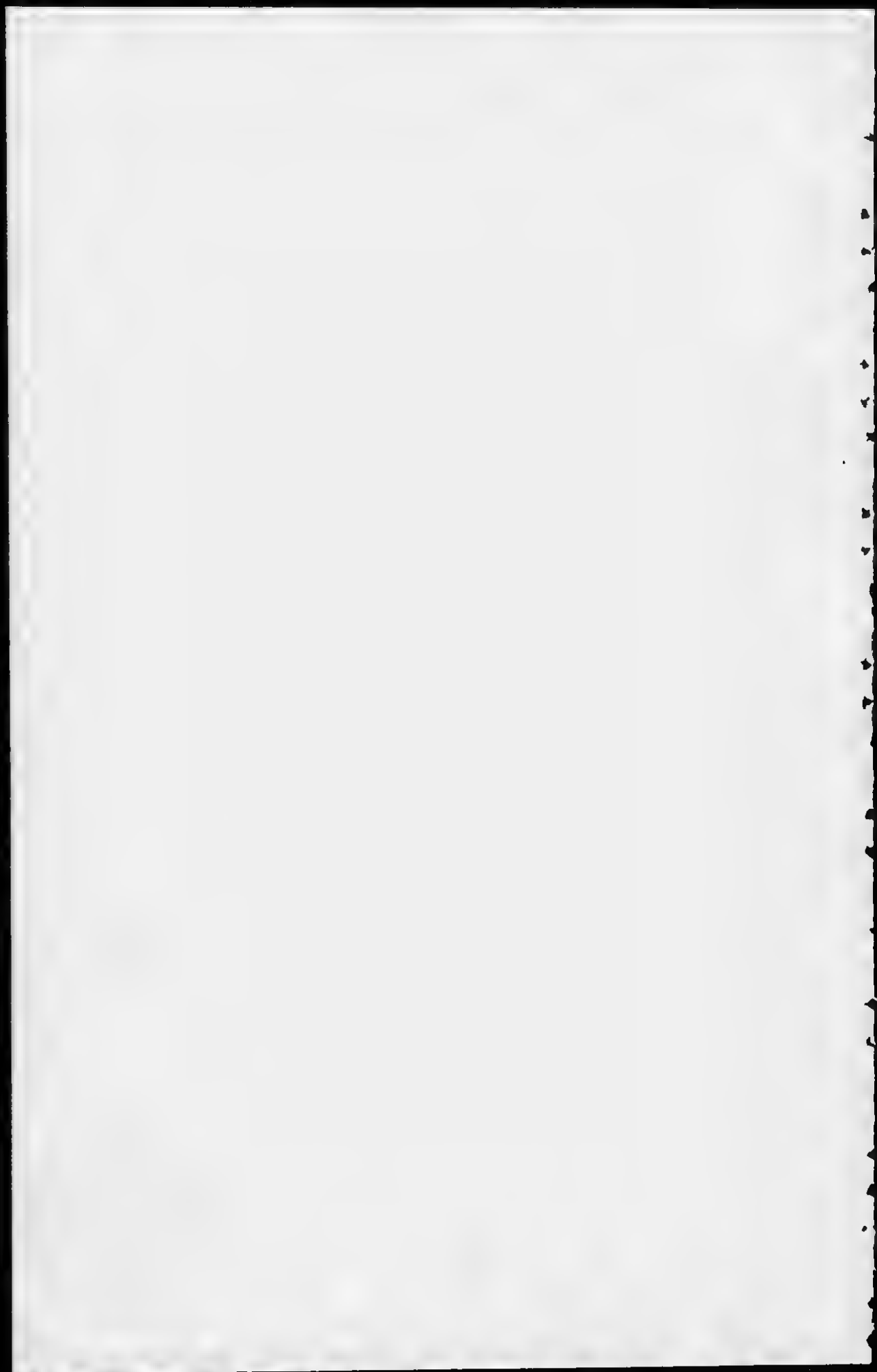
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FILED

APR 15 1963

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Federal Maritime Board Order of January 7, 1960

(Served, January 11, 1960
Federal Maritime Board)

At a Session of the Federal Maritime Board, held at its
Office in Washington, D. C., this 7th day of January 1960.

Docket No. 882

UNAPPROVED SECTION 15 AGREEMENTS— SOUTH AFRICAN TRADE

IT APPEARING from information before the Board that agreements within the contemplation of section 15 of the Shipping Act, 1916 (46 U. S. C. 814), fixing or regulating transportation rates or fares; or controlling, regulating, preventing, or destroying competition; or pooling or apportioning of traffic; or regulating the number and character of sailings; or in other manners providing for exclusive, preferential or cooperative working arrangements; may have been made during the period 1954 through 1958 affecting trade between the United States and South and East Africa by:

Louis Dreyfus Lines—joint service of
Louis Dreyfus et cie
Buries Markes, Ltd.
Farrell Lines Incorporated
Lykes Bros. Steamship Co., Inc.
Nedlloyd Line—joint service of
N. V. Stoomvaart Maatschappij "Nederland"
Koninklijke Rotterdamsche Lloyd, N.V.
Robin Line (Division of Moore-McCormack)
South African Marine Corporation Ltd.; and

Federal Maritime Board Order of January 7, 1960

IT FURTHER APPEARING, that the purported agreements referred to above have not been filed for approval under said section 15 nor approved thereunder and may have been carried out;

IT IS ORDERED, that an investigation is hereby instituted to determine whether any of the persons named above have carried out before approval under said section 15 any agreements requiring such approval, in violation of said section 15; and

IT IS FURTHER ORDERED, that all persons named above are made respondents in this proceeding which is to be set for hearing before an examiner from the Hearing Examiners' Office at a time and place to be announced; and

IT IS FURTHER ORDERED, that a copy of this order be served on each of the respondents and published in the Federal Register.

By the Board.

JAMES L. PIMPER,
Secretary.

(SEAL)
USCOMM-MA-DC

**Federal Maritime Board Amended Order of
January 15, 1960**

(Served January 18, 1960
Federal Maritime Board)

At a Session of the Federal Maritime Board, held at its
Office in Washington, D. C., this 15th day of January, 1960.
Docket No. 882

**UNAPPROVED SECTION 15 AGREEMENTS
VIOLATION OF SECTION 14; SECOND, FIGHTING SHIPS;
SOUTH AFRICAN TRADE**

IT APPEARING from information before the Board that agreements within the contemplation of section 15 of the Shipping Act, 1916 (46 U. S. C. 814), fixing or regulating transportation rates or fares; or controlling, regulating, preventing, or destroying competition; or pooling or apportioning of traffic; or regulating the number and character of sailings; or in other manners providing for exclusive, preferential or cooperative working arrangements, may have been made during the period 1954 through 1959 affecting trade between the United States and South and East Africa by:

Louis Dreyfus Lines—joint service of
Louis Dreyfus et cie
Buries Markes, Ltd.
Farrell Lines Incorporated
Lykes Bros. Steamship Co., Inc.
Nedlloyd Line—joint service of
N.V. Stoomvaart Maatschappij "Nederland"
Koninklijke Rotterdamsche Lloyd, N.V.
Robin Line (Division of Moore-McCormack)
South African Marine Corporation Ltd.; and

IT FURTHER APPEARING that the purported agreements referred to above have not been filed for approval under

*Federal Maritime Board Amended Order of
January 15, 1960*

said section 15 nor approved thereunder and may have been carried out;

IT FURTHER APPEARING from information before the Board that through agreement or otherwise a vessel or vessels has or have been used in the U. S. Atlantic/South and East Africa trade in 1957 or 1958 or 1959 for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade by:

Farrell Lines Incorporated
Robin Line (Division of Moore-McCormack); and

IT FURTHER APPEARING that the purported transaction or transactions referred to above may constitute violation of section 14, Second of the Shipping Act, 1916 (46 U. S. C. 812);

NOW THEREFORE IT IS ORDERED that an investigation is hereby instituted to determine whether any of the persons named above have carried out before approval under said section 15 any agreements requiring such approval, in violation of said section 15, and to determine whether Farrell Lines Incorporated and Robin Line (Division of Moore-McCormack) or either of them have operated vessels in violation of said section 14, Second; and

IT IS FURTHER ORDERED that all persons named above are made respondents in this proceeding which is to be set for hearing before an examiner from the Hearing Examiners' Office at a time and place to be announced; and

IT IS FURTHER ORDERED that a copy of this order be served on each of the respondents and published in the Federal Register.

By the Board.

JAMES L. PIMPER,
Secretary.

(SEAL)
USCOMM-MA-DC

**Federal Maritime Board Notice of Hearing of
January 18, 1960**

Served
January 22, 1960
Federal Maritime Board

**DEPARTMENT OF COMMERCE
FEDERAL MARITIME BOARD**

Docket No. 882

**UNAPPROVED SECTION 15 AGREEMENTS—
SOUTH AFRICAN TRADE**

**NOTICE OF INVESTIGATION, OF HEARING, AND OF
PREHEARING CONFERENCE**

On January 7, 1960, the Federal Maritime Board entered the following order:

“IT APPEARING from information before the Board that agreements within the contemplation of section 15 of the Shipping Act, 1916 (46 U. S. C. 814), fixing or regulating transportation rates or fares; or controlling, regulating, preventing, or destroying competition; or pooling or apportioning of traffic; or regulating the number and character of sailings; or in other manners providing for exclusive, preferential or cooperative working arrangements; may have been made during the period 1954 through 1958 affecting trade between the United States and South and East Africa by:

Louis Dreyfus Lines—joint service of
Louis Dreyfus et cie
Buries Marques, Ltd.
Farrell Lines Incorporated
Lykes Bros. Steamship Co., Inc.
Nedlloyd Line—joint service of

*Federal Maritime Board Notice of Hearing of
January 18, 1960*

N. V. Stoomvaart Maatschappij "Nederland"
Koninklijke Rotterdamsche Lloyd, N. V.
Robin Line (Division of Moore-McCormack)
South African Marine Corporation Ltd.; and

"IT FURTHER APPEARING, that the purported agreements referred to above have not been filed for approval under said section 15 nor approved thereunder and may have been carried out;

"IT IS ORDERED, that an investigation is hereby instituted to determine whether any of the persons named above have carried out before approval under said section 15 any agreements requiring such approval, in violation of said section 15; and

"IT IS FURTHER ORDERED, that all persons named above are made respondents in this proceeding which is to be set for hearing before an examiner from the Hearing Examiners' Office at a time and place to be announced; and

"IT IS FURTHER ORDERED, that a copy of this order be served on each of the respondents and published in the Federal Register."

Notice is hereby given that, in accordance with Rule 6(d) of the Board's Rules of Practice and Procedure, 46 CFR sec. 201.94, a prehearing conference in this proceeding will be held before Examiner C. B. Gray on February 10, 1960, at 10 A. M., in Room 4519, New General Accounting Office Building, 441 G Street, N. W., Washington, D. C. Thereafter a public hearing will be scheduled at a date and place to be announced. Said hearing will be conducted in accordance with the above Rules, and a recommended decision will be issued by the examiner.

All persons (including individuals, corporations, associations, firms, partnerships, and public bodies), having an interest in this proceeding and desiring to intervene therein,

*Federal Maritime Board Notice of Amended Order of
January 28, 1960*

should notify the Secretary, Federal Maritime Board, promptly and file petitions for leave to intervene in accordance with Rule 5(n), 46 CFR sec. 201.74, of the above Rules.

By order of the Federal Maritime Board.

(Sgd.) JAMES L. PIMPER
Secretary

Dated: January 18, 1960
USCOMM-MA-DC

**Federal Maritime Board Notice of Amended Order of
January 28, 1960**

Served
January 29, 1960
Federal Maritime Board

DEPARTMENT OF COMMERCE
FEDERAL MARITIME BOARD

Docket No. 882

UNAPPROVED SECTION 15 AGREEMENTS—
SOUTH AFRICAN TRADE

On January 15, 1960, the Federal Maritime Board entered the following order amending its original order in this proceeding, dated January 7, 1960, which was published in the Federal Register of January 21, 1960 (25 F. R. 520):

“IT APPEARING from information before the Board that agreements within the contemplation of section 15 of the Shipping Act, 1916 (46 U. S. C. §14), fixing or regulating

*Federal Maritime Board Notice of Amended Order of
January 26, 1960*

transportation rates or fares; or controlling, regulating, preventing, or destroying competition; or pooling or apportioning of traffic; or regulating the number and character of sailings; or in other manners providing for exclusive, preferential or cooperative working arrangements, may have been made during the period 1954 through 1959 affecting trade between the United States and South and East Africa by:

Louis Dreyfus Lines—joint service of
Louis Dreyfus et cie
Buries Markes, Ltd.
Farrell Lines Incorporated
Lykes Bros. Steamship Co., Inc.
Nedlloyd Line—joint service of
N. V. Stoomvaart Maatschappij "Nederland"
Koninklijke Rotterdamsche Lloyd, N. V.
Robin Line (Division of Moore-McCormack)
South African Marine Corporation Ltd.; and

"IT FURTHER APPEARING that the purported agreements referred to above have not been filed for approval under said section 15 nor approved thereunder and may have been carried out;

"IT FURTHER APPEARING from information before the Board that through agreement or otherwise a vessel or vessels has or have been used in the U. S. Atlantic/South and East Africa trade in 1957 or 1958 or 1959 for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade by:

Farrell Lines Incorporated
Robin Line (Division of Moore-McCormack); and

"IT FURTHER APPEARING that the purported transaction or transactions referred to above may constitute violation

*Federal Maritime Board Notice of Amended Order of
January 28, 1960*

of section 14, Second of the Shipping Act, 1916 (46 U. S. C. 812);

"NOW THEREFORE IT IS ORDERED that an investigation is hereby instituted to determine whether any of the persons named above have carried out before approval under said section 15 any agreements requiring such approval, in violation of said section 15, and to determine whether Farrell Lines Incorporated and Robin Line (Division of Moore-McCormack) or either of them have operated vessels in violation of said section 14, Second; and

"IT IS FURTHER ORDERED that all persons named above are made respondents in this proceeding which is to be set for hearing before an examiner from the Hearing Examiners' Office at a time and place to be announced; and

"IT IS FURTHER ORDERED that a copy of this order be served on each of the respondents and published in the Federal Register."

By order of the Federal Maritime Board.

(Sgd.) JAMES L. PIMPER
Secretary

Dated: January 28, 1960

**Federal Maritime Board Supplemental Order of
June 27, 1960**

Served
July 1, 1960
Federal Maritime Board

At a Session of the FEDERAL MARITIME BOARD, held at
its Office in Washington, D. C., this 27th day of June, 1960.

Docket No. 882

**UNAPPROVED SECTION 15 AGREEMENTS—
VIOLATION OF SECTION 14, SECOND, FIGHTING SHIPS
SOUTH AFRICAN TRADE**

WHEREAS the Board entered an Amended Order herein
on January 15, 1960, naming certain respondents and pos-
ing for investigation, among other things, the issue of
whether the said respondents entered into and carried out
prior to Board approval under Section 15, Shipping Act,
1916, agreements requiring such approval in violation of
said Section 15; and

WHEREAS subsequent to the entry of the above order, in-
formation has come before the Board indicating that the
respondents herein may have entered into and carried out
agreements fixing or regulating transportation rates or
fares, controlling, regulating, preventing, or destroying
competition; and providing for cooperative working ar-
rangements with Baron Iino Line who was not named as a
respondent in the above order;

NOW THEREFORE IT IS ORDERED that the scope of this in-
vestigation is hereby enlarged to include the determination
of the following issues:

1. Whether any or all of the respondents named
in the Amended Order of January 15, 1960, herein

*Federal Maritime Board Supplemental Order of
June 27, 1960*

and Baron Iino Line entered into and carried out prior to Board approval some time in 1958 and 1959 and continuing through the present time agreements fixing or controlling the freight rates for the movement of Liner Board, Kraft paper, Kraft wrapping paper and/or wrapping paper between ports in the United States and ports in South and East Africa in violation of Section 15, Shipping Act, 1916.

2. Whether any or all of the respondents named in the said Amended Order and Baron Iino Line entered into and carried out prior to Board approval during the year 1959 and continuing through the present time agreements fixing or controlling the freight rates for the movement of Bulk Tallow between ports in the United States and ports in South and East Africa in violation of said Section 15.

3. Whether any or all of the respondents named in the said Amended Order and Baron Iino Line entered into and carried out prior to Board approval during the year 1959 and continuing through the present time agreements fixing or controlling the freight rates for the movement of wool between ports in the United States and ports in South and East Africa in violation of said Section 15.

IT IS FURTHER ORDERED that said Baron Iino Line be, and it is hereby, made a respondent in this proceeding.

IT IS FURTHER ORDERED that a copy of this order be served on each of the respondents and published in the Federal Register.

By the Board,

JAMES L. PIMPER,
Secretary.

(SEAL)
USCOMM-MA-DC

Federal Maritime Commission Report of April 9, 1962

Served
April 10, 1962
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

No. 882

**UNAPPROVED SECTION 15 AGREEMENTS—
SOUTH AFRICAN TRADE**

1. Respondents (except Baron Ino Line) found during the period 1954-58 to have made and carried out an unfiled and unapproved cooperative working arrangement or agreement for the fixing of transportation rates and related matters affecting the trade between the United States and South and East Africa, in violation of section 15, Shipping Act, 1916. Respondents not found to have entered into or carried out unfiled and unapproved agreements in the trade in violation of said section after September 10, 1958.
2. Respondents Farrell Lines and Robin Line (Division of Moore-McCormack Lines) not found to have operated vessels during 1957-59 in the United States Atlantic/South and East Africa trade, in violation of section 14, Second, Shipping Act, 1916.
3. The permission granted by section 15, Shipping Act, 1916 for activities that would otherwise be unlawful is conditioned upon government supervision and

Federal Maritime Commission Report of April 9, 1962

control of such activities. Rigid compliance with the filing and approval provisions of the section is required.

4. Failure immediately to file an agreement within the purview of section 15, Shipping Act, 1916 is a distinct violation of the section.
5. Oral, informal or general agreements are subject to section 15, Shipping Act, 1916.
6. Unapproved discussions and exchanges of rate and similar information among persons subject to section 15, Shipping Act, 1916, clearly indicate the existence of an agreement, understanding or arrangement prohibited by the section.
7. An investigation by the Federal Maritime Commission is an administrative proceeding looking to the regulation of present or future activity. It is not a penal or criminal trial for past violation of law and should not be conducted as such. Matters in extenuation or mitigation of punishment for such violation are not relevant in a Commission investigation.
8. Strict evidentiary rules do not apply in proceedings before the Federal Maritime Commission. Contemporaneous letters and memoranda from respondents' files which showed or tended to show the existence of a cooperative rate-fixing arrangement were not objectionable as hearsay or otherwise, but were relevant, reliable and probative evidence.
9. A restricted or fragmented approach to the evidence is likely to defeat the objectives of an investigation, particularly one concerning informal, secret or general agreements subject to section 15, Shipping Act, 1916.

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10. Only the Federal Maritime Board was empowered to modify its orders instituting the investigation and establishing the issues of fact and law involved. It was improper to direct that Public Counsel in effect do so by filing statements particularizing such issues, and otherwise to circumscribe his efforts to fully develop the pertinent information.

Edwin Longcope and Morton Liftin for respondent Louis Dreyfus Lines.

Elmer C. Maddy and Ronald A. Capone for respondent Farrell Lines Inc.

John W. Douglas and Peter S. Craig for respondent Lykes Bros. Steamship Co., Inc.

Burton H. White and Elliott B. Nixon for respondent Nedlloyd Line.

Ira L. Ewers, W. B. Ewers and Albert Chrystal for respondent Robin Line (Division of Moore-McCormack Lines, Inc.)

Wharton Poor and R. Glen Bauer for respondent South African Marine Corporation, Ltd.

Morton Zuckerman for respondent Baron Ino Line.

Robert B. Hood, Jr. and Edward Aptaker as Public Counsel.

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REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*
JOHN HARLLEE, *Vice Chairman*
ASHTON C. BARRETT, *Commissioner*
JOHN S. PATTERSON, *Commissioner*

By order of January 7, 1960 and amendment of January 15, 1960, our predecessor the Federal Maritime Board initiated an investigation to determine whether any of the named respondents, Louis Dreyfus Lines (Dreyfus), Farrell Lines, Inc. (Farrell), Lykes Bros. Steamship Co., Inc. (Lykes), Nedlloyd Line (Nedlloyd), Robin Line (Division of Moore-McCormack Lines, Inc.), and South African Marine Corp., Ltd. (Safmarine), during the period 1954 through 1959, had entered into and effectuated without approval under section 15 of the Shipping Act, 1916 (the "Act"), any agreements affecting trade between the United States and South and East Africa requiring such approval.¹ Robin Line has been a division of Moore-McCormack since about May 1, 1957, at which time Mormac acquired the equipment of Seas Shipping Co., Inc. Robin is identified herein as Robin/Mormac as to events after May 1, 1957 and Robin/Seas as to events prior thereto:

The Board's amended order of January 15, 1960 also enlarged the investigation to determine whether respondents Farrell and/or Robin/Mormac had operated vessels in violation of section 14, Second, of the Act during 1957, 1958, or 1959 in the U. S. Atlantic-South and East Africa trade. By supplemental order of June 27, 1960, the proceeding was further enlarged to determine whether any of the original

¹ Louis Dreyfus Lines is a joint service of Louis Dreyfus et Cie., Buries Markest, Ltd., and Nedlloyd Line is a joint service of N. V. Stoomvaart Maatschappij "Nederland" Koninklijke Rotterdamsche Lloyd, N. V.

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respondents and Baron Iino Line, therein named an additional respondent, during 1958 and 1959 and thereafter through the date of the supplemental order, had entered into and carried out prior to approval under section 15 agreements fixing or controlling freight rates on certain commodities in this trade.

Testimony was taken at hearings held August 2 through 5, 1960 in Washington and October 13 and 14, 1960 in New York. Further sessions were held in New York on October 17 and 18, 1960 for the sole purpose of considering the admissibility of exhibits theretofore tendered, following which the hearings were concluded. In accordance with his responsibility in proceedings of this type for assembling and presenting evidence relating to the investigation the agency has ordered, Public Counsel subpoenaed relevant documents of the respondents and produced during the hearings some 160 exhibits which had originated in their files. With the exception of one Maritime employee, all of the witnesses in the case were officers or agents of the respondents subpoenaed by Public Counsel. They were called to the stand by him and identified exhibits which they had either authored, received, or were otherwise able to authenticate and in many instances they were examined regarding the contents of exhibits.

On rulings of the Examiner, pursuant to respondents' requests, respondents (1) were furnished by Public Counsel six weeks before the hearings commenced a statement particularizing the "charges" or "violations" intended to be asserted; (2) were furnished another such statement by Public Counsel on September 6, 1960, during the interval between the Washington and New York sessions; and (3) all of their cross-examination was deferred until Public Counsel had finished presenting his case in chief. Upon the completion of such presentation, respondents' counsel cross-examined respondents' officers and agents regarding the exhibits and testimony given on direct examination, and

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also took the occasion to present additional exhibits and develop other testimony through these witnesses. At the conclusion thereof, respondents elected to offer no further evidence. Public Counsel then offered into evidence, *seriatim*, 142 of the exhibits previously identified and testified to, but the Examiner, sustaining numerous objections by respondents, admitted only 29 of them. The rejected exhibits were made the subject of an offer of proof by Public Counsel in the manner provided by Rule 10(L) of our Rules of Practice and Procedure, and are therefore before us for consideration.

Briefs were filed by all parties and thereafter, on August 3, 1961, the Examiner issued a Recommended Decision. His ultimate conclusions were "that none of the respondents has entered into or carried out" during the period 1954-59 "any agreement as described in the Board's orders of investigation" in violation of section 15 of the Act, that respondents Robin/Mormac and Farrell had not operated vessels during 1957-59 in the Atlantic portion of that trade in violation of section 14 of the Act, and that "the charges against respondents" should be dismissed. Public Counsel filed exceptions to the section 15 segment of this decision and respondents replied objecting to the exceptions. Oral argument before us was not requested, nor have we deemed such argument necessary to the proper disposition of the case.

We are compelled to overrule the Examiner's recommended decision that no section 15 violations occurred, and to reverse his rejection of the documentary evidence tendered by Public Counsel. While entitled to weight, any recommended or initial decision which comes before us for our review remains only a recommendation. Upon review thereof we possess and must exercise when the situation requires "all the powers [we] would have in making the initial decision," including determinations of law, fact,

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policy and discretion. Where, as here, we find upon consideration of the entire record before us that substantial errors were committed, we must alter the Examiner's disposition of the case to whatever extent is necessary in our judgment to cure the errors and discharge our responsibility for insuring that the ultimate decision is correct. See section 8(a) of the Administrative Procedure Act, 5 U. S. C. 1007(a); Davis, *Administrative Law Treatise*, sec. 10.03; *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474 (1951); *F. C. C. v. Allentown Broadcasting Corp.*, 349 U. S. 358 (1955).

During most of the period encompassed by the orders of investigation herein, respondents comprised the only common carriers in the United States/South and East Africa trade. By the early part of 1954 Lykes, Safmarine and Dreyfus were the only common carriers engaged in the USA Gulf/South and East Africa portion of the trade. Lykes was the surviving and hence the only member of an approved conference for this portion of the trade (Gulf/South and East Africa Conference, Agreement No. 7780).

The only common carriers operating at the time in the United States Atlantic/South and East Africa portion of the trade were the respondents Farrell, Robin Line, Dreyfus and Safmarine, and a nonrespondent, the British South & East Africa Group. Only Farrell and the British Group were members of an approved conference for the Atlantic portion, namely USA/South Africa Conference (outbound) Agreement No. 3578, and South Africa/USA (inbound) Agreement No. 3579. In 1955 the British Group discontinued service leaving Farrell the sole surviving member of such conferences. Beginning in January of 1954, Nedlloyd served South African ports with one sailing per month from United States Pacific Coast ports. On return it provided inbound service to the North Atlantic before proceeding to the Pacific Coast. Dreyfus suspended its

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service in the trade in February 1957. Later, in December 1957, Baron Iino entered the trade and was succeeded in early 1959 by the respondent Baron Iino.

Pursuant to section 15 of the Act, Farrell and Robin/Seas in March 1956 submitted to the Federal Maritime Board and on July 2, 1956 the Board approved an agreement, No. 8054, permitting these two lines to confer together and agree on rates and other tariff matters in the trade, with the reservation that either of them could alter for itself the agreed rates and related matters on giving the other party at least 48 hours' notice. Robin/Mormac (as successor to Robin/Seas), Lykes, Nedlloyd and Safmarine subsequently became parties to the agreement, on August 19, 1957 in the case of Mormac and on April 3, July 28 and September 10, 1958, respectively, in the case of the others. Neither Dreyfus nor Baron Iino ever became parties. Agreement 8054 is currently in existence and is the sole section 15 agreement respecting the United States/South and East Africa trade which has included the mentioned respondents.

Section 15 of the Act requires every ocean common carrier to file immediately with the agency administering the Act a true copy, or if oral a true and complete memorandum, of every agreement with another such carrier to which it is a party or conforms in whole or in part, fixing regulating, transportation rates or fares; controlling, regulating, preventing or destroying competition; or in any manner providing for a cooperative working arrangement. The section defines "agreement" to include "understandings, conferences, and other arrangements." It also makes it unlawful for any common carrier to carry out any such "agreement" prior to approval of the agency, in this instance the Board.

The respondents severally deny being parties to any agreement covered by these provisions except Agreement 8054. They also argue matters in extenuation or mitigation of their activities. These are commented upon at the

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end of this report, since they are not relevant to the question whether respondents have acted in violation of the statute. On that question, so far as it concerns section 15, our conclusion is that Agreement 8054 simply formalized an unfiled, unsanctioned and therefore unlawful cooperative working arrangement or agreement for the fixing of rates and related matters which existed between and was implemented by the respondents (other than Baron Iino) long prior to Agreement 8054 and which thereafter continued to exist as to Dreyfus, until it withdrew its service in February 1957, and as to the remaining respondents, until Safmarine, the last of the respondents to sign, did so on September 10, 1958.

Nature of the Case—Procedure. Initially we must review and discuss, at some unavoidable length, the more important procedural and evidentiary errors that pervaded this case from its inception. In this connection, citation of some specific examples of the evidence received and rejected will be helpful. These errors appear to have been generated mainly by a basic misconception of the nature and purpose of the proceeding.

Respondents repeatedly portrayed the case as a penal or criminal proceeding involving the possible imposition upon them of heavy sanctions. In that connection they laid down a steady barrage of procedural and evidentiary demands and objections. It was a serious mistake for the Examiner to adopt respondents' view of the case. This gave rise to other errors and adversely influenced the entire course of the proceeding. The case was in no sense penal and respondents were "charged" with nothing. It was an administrative inquiry into activity possibly violative of the Shipping Act, instituted by the Board pursuant to its responsibilities under the Act to regulate present or future conduct through the issuance of appropriate orders or rules.

The agency administering the Act has no power to punish past conduct. It cannot impose penalties, monetary

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or otherwise, for violating the Act's provision. That may be done only in a penalty suit brought in a district court by the Department of Justice. The character of such a suit is distinctly different from that of any administrative inquiry. Its trial is governed by different and more strict principles, procedures and evidentiary rules which are wholly unnecessary to the objectives and proper conduct of our proceedings. This same subject was dealt with by the Board in its 1955 decision in *Practices of Fabre Line and Gulf/Mediterranean Conf.*, 4 F.M.B. 611, which was also an investigation on the agency's own motion and from which we quote the following (p. 636):

"Nor do we consider, as argued by Fabre, that the nature of this proceeding requires application of evidentiary standards proper in criminal or 'quasi-criminal' proceedings. Although section 16—Second of the 1916 Act provides criminal penalties, those penalties may only be imposed in a proceeding commenced by the Department of Justice* in a court of competent criminal jurisdiction. No penalties may be imposed in this proceeding nor may the record here be used as the basis for collection of fines."**

Under the Shipping Act, the Board's primary function was, and ours is, to regulate, not to punish, and it does seem to us that there is no room for any further confusion on this point. Investigation is indispensable to the administrative regulatory function and may be undertaken "merely on suspicion that the law is being violated, or even just because [the agency] wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Where, as here, the agency investigation is a formal one, the essentials of a full and fair hearing can

* 28 U. S. C. A. 507.

** See Davis, *Administrative Law*, 1951, at pp. 305, 306 on the constitutional requirement for trial by jury in criminal matters.

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easily be observed without attempting to convert the proceeding into some sort of penal or criminal trial.

The respondents also made frequent demands for particularization of what they called the "charges" against them. It was in response to these demands that the Examiner, as previously noted, required Public Counsel to furnish respondents on two separate occasions with detailed statements of "charges" or "violations" intended to be urged, and in addition postponed respondents' cross examination until completion of Public Counsel's entire evidentiary presentation. These extraordinary measures on respondents' behalf were not warranted by anything in the nature and purpose of the proceeding, nor indeed by any actual ignorance on respondents' part of the matters under investigation.

Respondents were notified by the Board's orders of the possible proscribed activity, the areas of their operations and the periods of time to be investigated. These orders clearly satisfied the requirements of subsection 5(a)(3) of the Administrative Procedure Act (5 U. S. C. 1004(a)(3)) and the Board's Rule 10(c), which only provide that notice be given of "the matters of fact and law asserted," i.e., the legal and factual issues involved, and that sufficient time be allowed to prepare to meet such issues.² Nearly seven months elapsed between the issuance of the orders and the commencement of the hearings, so that respondents manifestly had adequate opportunity to prepare. The facts, moreover, were exclusively in the respondents', not the Board's, possession. Documents in respondents' files and knowledge possessed by their officers and agents constituted virtually all the evidence. No basis existed at any time for the inference that respondents did not know what the Board proceeding concerned or were unable fully to represent their interests.

² See Attorney General's Manual on the Administrative Procedure Act (1947), pp. 47, 129.

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It is apparent that in demanding the aforesaid statements from Public Counsel respondents were seeking to have him in effect modify the issues of fact and law stated in the Board's orders of investigation, whereas only the Board could have done so. Public Counsel neither initiated nor was responsible for the contents of the orders and he could not amend them. If respondents believed them lacking in any respect, their recourses were solely to the Board. Respondents recognized the orders were controlling where they thought it to their advantage. In other instances they sought to exclude issues or evidence within the scope of the orders on the ground that Public Counsel's statements did not specify them. The Examiner himself was not entirely consistent in this matter.

In a formal investigation ordered by the agency, Public Counsel has the duty to insure that the relevant and probative evidence is developed to the fullest possible extent. His primary mission is to get the pertinent information, often from the persons least interested in giving it. In the proper pursuit of this mission it would seem to be obvious that he should be encouraged, not circumscribed, if the investigative aims are to be achieved. The various demands that were here permitted to be made upon Public Counsel amounted to putting him on trial for the fact that an investigation had been ordered. The statements he was required to furnish interfered with the performance of his duty to develop the evidence, as the respondents themselves demonstrated by their attempts to hamstring his submissions. Moreover, if viewed simply as position papers, the statements at best represented only tentative estimates of possible ultimate findings. One was prepared before, the other during, the hearings, without benefit of all the evidence and respondents' positions thereon. In such circumstances, we fail to see how they could have contributed usefully to the case, and they plainly were not germane to an investigative proceeding. On the other hand, they disadvantaged the presentation of evidence and caused delay and some con-

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fusion, although certainly nothing that about which the respondents could justifiably complain. Such statements are not provided for in the rules but were an undesirable innovation in this case. Since then it appears they have been required in a few other investigations. We think it is clear that the practice should be discontinued.

Evidence. Section 7(c) of the Administrative Procedure Act permits the receipt in evidence of "any oral or documentary evidence," subject only to the admonition that irrelevant, immaterial or unduly repetitious evidence should be excluded. (5 U. S. C. 1006(c)). This exclusion is provided for in the Board's Rules of Practice and Procedure (now adopted by us) and, conversely, they authorize the admission of "all evidence which is relevant, material, reliable and probative" (Rules 10(g) and (h)). The statute and the rules are consistent with the long-established principle that the technical evidentiary requirements, sometimes also called "the common law exclusionary rules", do not apply in proceedings before administrative agencies (unless of course the agency's organic statute so requires, and ours does not). A major reason for this is that administrative agencies, unlike the lay juries for whom the exclusionary rules were meant, are presumed competent to judge the weight that should be given evidence. The Board in its *Fabre Line* decision, *supra*, also reviewed this subject, and at some length, 4 F. M. B. 611, 633-36.³

³ See also Attorney General's Manual, *supra*, pp. 76, 134; *F. T. C. v. Cement Institute*, 333 U. S. 683 (1948), reh. den. 334 U. S. 839; *Willapoint Oysters v. Ewing*, 174 F. 2d 676 (CA 9, 1949), cert. den. 338 U. S. 860; *Concrete Materials Corp. v. F. T. C.*, 189 F. 2d 359 (CA 7, 1951); *Rhodes Pharmacal Co. v. F. T. C.*, 208 F. 2d 382 (CA 7, 1954), mod. other grounds, 348 U. S. 940; *Buchwalter v. F. T. C.*, 235 F. 2d 344 (CA 2, 1956); *Yiannopoulos v. Robinson*, 247 F. 2d 655 (CA 7, 1957); *O'Boyle v. Coe*, 155 F. Supp. 581 (D. C. D. C., 1957); *Smith v. General Truck Drivers, etc.*, 181 F. Supp. 14 (D. C. Cal., 1960).

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The efficient performance of our regulatory functions demands that we find the truth as expeditiously as possible. Strict evidentiary rules are not conducive to expedition if, as here, they are made the vehicle for innumerable objections which result in much delay and confusion. Since as indicated the rules are not necessary in the proper conduct of our proceedings, controversy over evidentiary niceties and formalities should not be invited by attempting to apply them. We do not, of course, suggest the substitution of an overly-relaxed approach to acceptable evidence nor anything which lacks essential fairness, having due and correct regard for the nature and purpose of our proceedings. We simply point out that evidence which appears to satisfy the nonrigorous standards of our rule ought to be received promptly and without controversy grounded upon technical exclusionary rules. If upon consideration of the whole record it is found that some of the evidence so admitted is not substantial and should be disregarded in formulating the proposed agency action, that can readily be done. We doubt that any harm flows from such procedure but if it does it is small indeed in comparison with that occasioned by needless squabbles over strict evidentiary principles. As the Court of Appeals for the Second Circuit stated, in *Samuel H. Moss, Inc. v. F. T. C.*, 148 F. 2d 378, 380 (1945), cert. den. 326 U. S. 734:

“• • • Why either he [the Examiner] or the Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chanced that no injustice was done, but we take this occasion to point out the danger always involved in conducting

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such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.”

[See also *Donnelly Garment Co. v. N. L. R. B.*, 123 F. 2d 215, 224 (1942)]

In the instant proceeding “idle bickering” about technical niceties in connection with the evidence consumed much of the hearing time and resulted eventually in the exclusion of about 80 percent of the evidence, all of it of relatively good quality. Rejected were more than 100 undeniably-authentic, contemporaneously-written letters and memoranda from the files of respondents or their agents which were relevant and probative on the questions under investigation. There was considerable erroneous reliance upon the hearsay rule. In some instances, the exhibit in question did not, in our judgment, constitute hearsay. In others, we believe the exhibits could have been received, even under strict evidentiary principles, as being within one of the exceptions to the hearsay rule, *e.g.*, as an admission or statement against interest, or as part of the *res gestae*.

More importantly, however, hearsay objections were not tenable as a basis for exclusion of evidence in this administrative investigation. Neither the Administrative Procedure Act nor the Board’s rules excluded hearsay and the hearsay rule has been expressly held inapplicable in administrative proceedings. For example, see *I. C. C. v. Baird*, 194 U. S. 25 (1904); *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1941). The Board so held in the *Fabre Line* case as follows (4 F. M. B. 611, 635-36):

“Fabre states that the examiner erred in overruling objections to the introduction of hearsay evidence, arguing that the decision in *Edison Co. v. Labor Board*, *supra*, [305 U. S. 197 (1938)] on which the examiner relied, was based on a statute which specifically relaxed

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the rules of evidence, which has since been amended, and which does not represent the law applicable to proceedings before this agency. These contentions are unsound; hearsay evidence is clearly *admissible* under the terms of APA and under our rules which, as hereinbefore stated, follow the APA. Further, the cited decision was relied on in drafting section 10 (e) of the APA."

The weight to be accorded the statement of someone not on the witness stand (i.e., hearsay) does not govern and should not be confused with its admissibility. If competent under the criteria applicable in an administrative proceeding, the statement is receivable in evidence and may be used to support agency action if there is at least some other supporting proof in the record of a direct nature. There is no question here as to the exclusive use of hearsay. To the contrary, there is more than ample proof in the record, both oral and written and often squarely related to and corroborative of the hearsay evidence, to justify according the latter credibility and weight. See *N. L. R. B. v. Remington Rand*, 94 F. 2d 862, 873 (CA 2, 1938), cert. den. 304 U. S. 576.

The record reveals evidentiary positions, rulings and results which are quite inconsistent. Contributing to this, no doubt, were the number and variety of objections respondents saw fit to urge at every turn. Comments on specific aspects of this situation appear at a later stage of this report, following the evidentiary examples below. At this point we simply note our inability to discern any material distinction between the quality and competency of the evidence the Examiner properly received and that of the evidence he rejected.

Set forth in the following paragraphs are examples of the admitted and excluded exhibits and testimony thereon by respondents' officers and agents. These are instructive as to the evidence which was offered and are quite illumi-

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nating as to the unapproved rate activity. It will be noted that the several respondents (other than Baron Iino) constantly name one another in these samples of their contemporaneous comments on their discussions, arrangements and agreements. References to Dreyfus will be found in pars. 3, 4, 6, 11-13, 15-18, 20; to both Farrell and Robin in each of the 22 pars, except No. 4; to Lykes in pars. 1-4, 6-9, 11-20; to Nedlloyd (which was concerned only with the inbound traffic from Africa) in pars. 6, 16, 17, 22; and to Safmarine (which was concerned only with the outbound traffic to Africa) in pars. 1-3, 7-9, 11, 13, 17-21.

Examples of Admitted Evidence.

1. The following is from a memorandum by President James Farrell Jr., of Farrell Lines to Messrs. Shields and Unver of his company dated February 11, 1954 (Ex. 43), regarding a possible rate reduction on lubricating products he had discussed with Mr. Ray Vaughn, a representative of Standard Vacuum Oil Co.:

"* * * I then said to Mr. Vaughn [of Standard Vacuum] I was sympathetic to such a reduction but could not and would not put the rate into effect without the concurrence of both our Conference and non-Conference colleagues. I said that since Safmarine, Robin, and Lykes were not in conference with us, it would be best if before we undertake to explore the matter with these carriers [sic], making it clear that I had made no commitment to him, nor would I make any commitment to him without their agreement and support. * * *

"Mr. Vaughn undertook to lay the ground work in accordance with my suggestion. * * *

"In order that the question of a possible reduction in rates on lubricating products may be considered without any misunderstanding as to the position of Farrell Lines, Inc. or of me personally, I now suggest

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that Mr. Unver bring Mr. McCracken up to date and that Mr. Shields discuss the matter with appropriate representatives of Robin, Safmarine and Lykes. I have made no commitment. Unless all concerned share my view as to the advisability of a reduction, I do not intend to make any."⁴

On direct examination in connection with this memorandum, Mr. Farrell stated that he and his personnel had conversations with the lines therein mentioned which resulted in "concurrence" among the lines on rate matters.

2. On August 13, 1954, Mr. Farrell wrote a letter to a shipper, Wilbur-Ellis Co., regarding a reduction on rates on fishmeal, which stated (Ex. 47):

"We are also pleased to advise that this rate has been concurred to by the Robin Line, Lykes and Safmarine."

On direct examination concerning this statement Mr. Farrell testified "it was furtherance of our cooperative efforts with Robin Line and Lykes and, of necessity, with Safmarine" and further said:

"It was not unusual for someone in our company to contact someone in their company and ask if such rate was agreeable."

3. In February 1955 Lykes' assistant secretary O'Kelley in New York sent to Lykes' New Orleans office a series of teletypes. These concerned exceptions to the 15 percent general rate increase, which respondents (other than Nedlloyd and Baron Ino) had agreed to put into effect March 1, 1955 in the outbound trade and which in fact became effective that date, and the 48-hour notice of rate changes the respondents had concurrently agreed to give one another. In one of these (Ex. 99) the following appears:

"UNDERSTANDING SO. AFRICA SPECIFICALLY CARRIES
COMMITMT EA LYKES DREYFUS SAF MARINE NOTIFY

⁴ Bracketed matter in quotations supplied.

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OTHERS INCLUDG CONF. [FARRELL] & ROBIN 48 HOURS BEFORE MKG ANY RATE CHANGES AND CERTAINLY ONCE WE HAD EXCEPTNS CLEAR * * * IT WAS UNDERSTOOD NO MORE EXCEPTIONS WLD BE MADE AT LEAST UNTIL MARCH 1 ACCT ABSOLUTE NECESSITY HOLD THE LINE BECAUSE ALRDY PRESSURE IS GREAT FOR EXCEPTNS SHIPPERS CLAIMG DISCRIMINATION ETC. * * * WE HONESTLY DO NOT FEEL SAFMARINE OR DRYFUS HAVE FAILED LIVE UP UNDERSTANDG AND WE THINK IT IS THEIR INTENTN TO DO SO ON BASIS WE ALL AHEAD FINANCIALLY. * * *

When queried as to the nature of the "understanding" he felt the other respondents would live up to, Mr. O'Kelley testified:

"* * * although there might have been some areas of differences of opinion, that basically we felt that we all had a common interest and to that end, which would be increase in revenue, rate stability, that the other lines, as their best judgment dictated, would proceed in accordance with the thoughts expressed by them during our conversations."

4. Another such Lykes' New York-New Orleans memorandum by Mr. O'Kelley in February 1955 (Ex. 101), on the question whether Dreyfus was required by the "agreement" to quote the same rates as Lykes, contains the following:

"* * * PLS REMEMBER THAT OUR AGREEMENT WAS THAT WE WLD INCREASE ALL RATES 15 PCT AND NEVER DID WE EVER AGREE THAT RATES WLD BE QUOTED ON PARITY HOWEVER BELIEVE PARITY CAN BE ACHIEVED ONCE WE GET LOOK AT TARIFF AND NEGOTIATE ON INDIVIDUAL RATE BASIS WITH DREYFUS."

5. On July 1, 1955 Mr. Farrell wrote a memorandum (Ex. 69) to W. C. Shields of his company about a meeting he had June 29, 1955 with Mr. Cook, president of Robin/Seas, on the possibility of having Robin and other lines join the USA/South Africa Conference, of which

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Farrell was then the only surviving member, containing the following:

"Cook then said that his position remained unchanged. Robin would join the Conference if *all* Lines were in. . . .

"Mr. Cook dwelt at some length upon the fact that Mr. Maguire now occupies senior position [in Robin/Seas] and we could expect full cooperation on rates and no rate cutting. He said that Mr. Maguire had been instructed to keep in touch with W.C.S. [W. C. Shields] and keep the rate situation to our mutual satisfaction."

6. By letters of January 23 and 27, 1956, Mr. J. C. Severiens, president of Java Pacific Line, Nedlloyd's general agent in the United States, addressed Farrell, Robin/Seas, Dreyfus and Lykes about increasing the rate on sisal tow in the Africa/Atlantic trade, in which Nedlloyd operated inbound before returning to the Pacific, and about a proposed general increase in the rate from Africa to Pacific Coast ports (Exs. 62, 131-34). Mr. Severiens' letter of January 23, 1956 to Mr. Farrell (Ex. 62) reads in part as follows:

"I shall be glad to hear whether you agree with us that an increase under the circumstances is fully warranted. I am addressing similarly Messrs. Robin, Dreyfus and Lykes Lines.

"For you guidance I wish to inform you that, as far as our rates from Africa to Pacific Coast ports are concerned, we are contemplating announcing an increase amounting to 15% to 20% effective March 1st.

"Looking forward to your advices, . . ."

Mr. Farrell, by letter of January 30, 1956 (Ex. 63), replied regarding the increase to Pacific Coast ports in part as follows:

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"* * * in agreement with Robin Line (Seas Shipping Company, Inc.) we have already raised our through bill of lading rates to Pacific Coast ports from South and East Africa via New York, to the levels which you have suggested."

7. On December 6, 1957, Mr. J. M. Phillips as Secretary, USA/South Africa Conference, who was acting in reality as agent for Farrell, the sole member of that conference, sent out a notice which states (Ex. 34):

"USA/SOUTH AFRICA CONFERENCE

To ALL LINES:

DECEMBER 6, 1957

ASPHALT OR ASPHALTUM

"Further to my circular of November 21st on the above subject please note that it has now been proposed that the present rates on Asphalt or Asphaltum be made effective through June 30, 1958.

"Please advise if you concur."

Among other respondents who received this notice was Robin/Mormac, whose freight agent, Harold Flad (also previously employed by Robin/Seas), testified that on the bottom thereof he had written, "All lines agreed," and that "all lines" meant Farrell, Robin/Mormac, Lykes and Safmarine. At the time only Farrell and Robin/Mormac were parties to Agreement No. 8054 approved July 2, 1956, as hereinbefore mentioned.

8. Mr. Flad of Robin/Mormac also prepared detailed memoranda of rate meetings he attended in September and October 1957 and March of 1958 (Exs. 35-38), at which times as before indicated Farrell and Robin/Mormac were the sole signatories of Agreement 8054. One of these memos, dated September 11, 1957 (Ex. 35), states in part:

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"Subject: RATE MEETING—SEPTEMBER 10, 1957

"Meeting convened at 2:30 p.m. at the USA/South Africa Conference Room, 26 Beaver Street.

"Attended by:

J. Phillips—Chairman USA/South Africa Conf.
J. Unver—Farrell Lines
V. O'Neill—Farrell Lines
L. Buser—SAF Marine
P. O'Kelly—Lykes Bros.
J. Kelly—Robin/Moore-McCormack
H. Flad—Robin/Moore-McCormack"

Thereafter follows a listing of 11 rate, classification and related items which were discussed, with agreement reached as to the action to be taken on over half of them and the balance "tabled for further study."

9. Another such memorandum by Mr. Flad (Ex. 36) states in part:

"Subject—RATE MEETING—SEPTEMBER 16, 1957

"Meeting convened at 2:30 p.m. at the USA/South Africa Conference Room, 26 Beaver Street.

"Attended by:

J. Phillips—Chairman USA/South Africa Conf.
F. Unver—Farrell Lines
V. O'Neill—Farrell Lines
L. Buser—SAF Marine
P. O'Kelly—Lykes Bros.
J. McAvoy—Robin/Moore-McCormack
J. Kelly—Robin/Moore-McCormack
H. Flad—Robin/Moore-McCormack"

Thereafter follows a listing of 13 separate rate, classification and related items discussed and the action which those

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attending agreed upon. An example of these entries is as follows:

“(13) POWDERED MILK

This item has been under review by all the lines and after a full discussion it was decided to amend tariff as follows:

MILK, POWDERED (including Dietetic)	\$42.25
FOOD, INFANT DIETETIC, N. O. S.	59.75
(effective Sept. 17, 1957)”	

Examples of Excluded Evidence.

10. A memorandum (Ex. 5) written on February 11, 1954 to one of Robin's traffic employees by Mr. S. J. Maddock, then vice president for traffic of Robin/Seas (later deceased and succeeded by Mr. C. H. McGuire, contains this comment:

“Fred Unver [general traffic manager for Farrell] called today and advised they have a letter from Clarence Provost of the International General Electric Co. asking for rates on three Diesel locomotives for shipment to Durban. * * * I have not seen it but would like to have a copy of this rate request.

“You can tell Provost that it is customary procedure with most shippers to send us a copy of their request for rate reductions to the Conference [Farrell] and that we and Farrells usually discuss such rate requests before anything is decided and then we always quote the same rates.”

11. A letter to Safmarine dated April 6, 1954, by Mr. W. H. McGrath, a States Marine Lines vice president, in charge of the latter's Safmarine Agency (Ex. 116), discusses the rate reduction proposal made by Mr. Vaughn

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of Standard Vacuum Oil Co., the same subject mentioned above in par. 1, and contains the following:

" * * * As a result of all of this we advised both Farrell and Robin and Ray Vaughn that we could not see a rate reduction at this time and that we were fearful that such a reduction might initiate some of the oil companies taking advantage of Dreyfus' offerings and there was no telling where the rate would finally end."

Previously on direct examination Mr. McGrath conceded he had held rate discussions as Safmarine's agent with Robin, Farrell, Lykes and Dreyfus.

12. On September 1, 1954 Mr. Maddock of Robin/Seas wrote that line's agent at Mombasa a letter (Ex. 18) reading in part as follows:

" * * * This same propaganda was spread around New York about a month ago and if it were not for the fact that the Robin Line had just made an agreement with Dreyfus to work together on rates, it is probable that Farrells, Robin and the others would have reduced the rates unnecessarily. * * *

"We have been intending to write to you and London about our very recent negotiations with the Louis Dreyfus Line and their New York agents, Ponchelet & Company. * * * There is a man working for them and in charge of traffic, by the name of John Boyes. * * *

"I told Mr. Boyes that we would be most happy to work with the Dreyfus Line on rates if we could depend on them but that our experience in the past had not assured us on this matter. I told Mr. Boyes that it would probably only work if Paris would agree

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not to reduce any rate without first submitting it to Mr. Boyes to discuss it with us. * * * Mr. Boyes offered to submit the proposal to his principals in Paris and endeavor to obtain their concurrence. * * * We received a message a few days later from Mr. Ponchelet that Mr. Moine had confirmed that the Dreyfus Line in Paris had agreed to this arrangement. This is now in effect and before we reduce any rate on any commodity being shipped to or from Madagascar or South and East Africa, we call Mr. John Boyes and discuss it with him, just as we have been doing with Farrells and Lykes. Mr. Boyes now telephones us when he has any proposal for reducing rates and we exchange information as to whether or not it is advisable to grant the reduction.

"Farrell and Lykes have been informed by me of this working arrangement that we have with Dreyfus and they are very pleased about it. Farrells and Lykes always consult us before reducing rates and we now discuss the matter with Dreyfus before giving any decision to Farrells or Lykes."

13. In a teletype from New Orleans to his New York office dated December 23, 1954 (Ex. 81), Lykes' vice president for traffic, Alec C. Cocke, stated:

"* * * AS YOU RECALL SOMETIME BACK WE WERE FORCED REDUCE GULF RATE ACCT MADDOCK'S [OF ROBIN/SEAS] INSISTENCE IN DOING IT OVR OUR OBJECTION THAT GULF ASPHALT RATE MUST B THE SAME AS TRINIDAD. AS I VIEW YOUR TELETYPE HE IS NOW ABOUT-FACE THIS SITN. WE ARE PERFECTLY WILLG NOTIFY ALL CONCERNED AS TO LONG-RANGE COMMITMNTS WE HV ON OUTWARD RATES. THIS IS A DEF AGRMNT BETWEEN THE LINES AND WE ARE FIRMLY OF THE OPIN SOME SORT OF AGRMNT BETWEEN ALL THE LINES INVOLVED MUST B FILED WITH THE FMB AND AM WONDERING HOW STATES MARINE [AGENT OF SAFMARINE] WL VIEW THIS AS THEY HAVE STEADFASTLY NOT BN WLG TO CONSDR ANY CONFRNC SETUP SO TO SPEAK."

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Mr. Cocke on the witness stand identified "all concerned" as being Farrell, Robin, Safmarine and Dreyfus.

14. A memorandum written by Mr. Cocke on December 29, 1954 to Lykes' Durban office (Ex. 82), refers to respondents' agreement on the 15 percent general rate increase and the 48-hour notice of rate changes, stating in regard to the latter:

"This is really an informal agreement and I still think something should be filed with the Maritime Administration but Messrs. Robin and Farrell feel otherwise, and in this connection New York advised us on December 27 as follows:

"* * * ROBIN AND FARRELL CONSIDER EXCHANGE TARIFFS AND DISCUSSIONS PRIOR RATE CHANGES BETWEEN GULF LINES NO DIFFERENT FROM PRACTICE BETWEEN NO. ATL LINES WHICH HAS WORKED OUT SATISFACTORILY WITHOUT FMB FILING."

15. On January 20, 1955 Dreyfus' principal in Paris by Mr. Jean Cassegrain wrote Mr. J. E. Ponchelet of Ponchelet Marine Corp., New York, Dreyfus' general agent in the United States (Ex. 140), regarding among other things the aforesaid 15 percent general increase which was due to become effective March 1, 1955, as follows:

"As regards the general increase of 15% it seems that this is now as good as done with the only exceptions so being: Bitumen, Petroleum Products, Synthetic Rubber. * * *

"As regards our relations with LYKES, we agree with your viewpoint that for the present it is a sufficient step to start an agreement on rates similar to that which we now have with ROBIN and FARRELL, but we have indicated to you that you should leave the door open to something more comprehensive. The idea is that, if and when the rate agreement works satisfactorily, for some time, your contacts with LYKES should become

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more frequent and more friendly and, then, it might be easier to bring about something closer to what is our main purpose, i.e.: an agreement to limit direct competition."

16. On March 24, 1955 Mr. Arend Drost, treasurer of the Java Pacific Line, Nedlloyd's general agent in the United States, wrote his principal in Amsterdam regarding inbound rate increases (Ex. 124), in part as follows:

"Enclosed please find copy of a circular dated March 22nd of the South Africa/USA Conference [Farrell], indicating increases and changes in freight rates which have been tentatively agreed upon between the Conference Lines and Robin, who are still in communication regarding same with Dreyfus Line and Lykes, besides ourselves. The matter is expected to be finalized shortly, at which time it will also be decided when the new rates will become effective.

"* * * it is our idea to increase rates to the Pacific Coast on a dollar for dollar basis with those arranged to the Atlantic."

17. Mr. Drost on May 13, 1955 also wrote his principal, Nedlloyd (Ex. 125), in part as follows:

"We wish to confirm the following cables sent you and Capetown Agents on May 11th:

"* * * FARRELL ROBIN DREYFUS SAFMARINE LYKES
WE AGREED INCREASES AS PER CIRCULARS ATTACHED
OURLETS AMSTERDAM MARCH 24 28 MAY 9 BECOMING
EFFECTIVE JUNE FIFTEENTH AS PER TARIFF RULE
ONE G"

18. On November 2, 1955 Mr. C. H. McGuire, Mr. Maddock's successor as traffic vice president of Robin/Seas, and later in the same post with Robin/Mormac, sent Robin's London representative a cablegram (Ex. 6) which states in part:

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"REFERENCE CONVERSATION ASPHALT BITUMEN RATES
LYKES FARRELL SAFMARINE DREYFUS OURSELVES
HAVE AGREED FOLLOWING NEW RATES * * * ALL NEW
RATES WOULD BE EFFECTIVE FROM JANUARY FIRST
THROUGH JUNE THIRTIETH 1956"

On direct examination Mr. McGuire stated that rate changes were often prefaced by conversations with Farrell, Lykes, Safmarine and Dreyfus.

19. On June 6, 1956 Mr. McGuire wrote a memorandum for the file (Ex. 9) reading in part as follows:

"As requested by Mr. Farrell and Mr. Mercer [Safmarine] during our general discussion this morning, I called Alec Cocke of Lykes Bros. on the telephone this afternoon and outlined to him the views of Farrell, Safmarine and ourselves with respect to specific increases on automobiles and agriculturals and on container board/Kraft paper as well as the suggested 5% general rate increase after adjustment of the aforementioned specific rates. * * *

"Upon being pressed by me for a definite statement of his position on the several proposed rate increases, he advised that he would support (provided all other lines did so as well) the upward adjustment proposed for automobiles and agriculturals and for container board/Kraft paper and would also agree to the proposed 5% general rate increase after adjustment of those individual items. * * *

20. On June 27, 1956 Messrs. Flad and McAvoy of Robin/Seas, later of Robin/Mormac, wrote a memorandum to Mr. McGuire (Ex. 14) which states in part:

"In accordance with decision taken at meeting of Friday, June 22nd the undersigned met on June 25th

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and 26th at the office of the Conference with representatives from Farrell Line (F. Unver), Safmarine (F. DeMarco), Lykes (P. O'Kelly) and Dreyfus (G. Connelly) to set up uniform and accurate new rates based upon an anticipated 5% increase over rates presently in effect. Copy of the new schedule is attached thereto."

The memorandum then details various other rate and tariff action agreed upon by the respondents. On direct examination Mr. McGuire testified that the meetings referred to took place and that what he described as "generally similar action" was later taken by Robin/Seas, Farrell, Lykes, Dreyfus and Safmarine.

21. Mr. W. H. McGrath of the States Marine agency for Safmarine, wrote his principal Safmarine on November 6, 1957 (Ex. 118), at which time Farrell and Robin/Mormac but not Safmarine were members of Agreement No. 8054 approved July 2, 1956, in part as follows:

"I am going to have lunch today with Hugh TenEyck [of International Ore & Fertilizer] along with Robin and Farrell, in the hope that we can all agree with him on equitable freight rate on his business and keep him away from U. S. Navigation * * *."

On direct examination Mr. McGrath affirmed that this meeting took place, with Mr. McGuire representing Robin/Mormac and Mr. Gorman representing Farrell Lines, but stated the meeting was fruitless because "we never did get from Mr. TenEyck what he felt was a rate which * * * he was willing that the lines each charge for participating in the carriage of this particular commodity."

22. On November 25, 1957 Mr. McGuire, by this date traffic vice president of Robin/Mormac, wrote a memoran-

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dum to J. E. Fee of his company (Ex. 15) reading in part as follows:

"In company with John Gorman of Farrell Lines I met this afternoon with Charles McLagan of Turnbull Gibson and Company (London) and Frank Marick and Al Shields of American Metal Company at the latter's office to resume our negotiations on Copper rates for the coming year.

* * * * *

"With respect to our competition I had the assurance before going into this meeting from Mr. Hans Severiens of Nedlloyd that his company would agree and abide by any rate that Mr. Gorman and I negotiated with the Copper people and I have advised him as to the outcome of the meeting. * * * "

On direct examination Mr. McGuire acknowledged that he had the conversation referred to with Mr. Severiens of Nedlloyd and that his recollection of it was in accord with the statement made in this memorandum.

Evidentiary Errors. The general nature and extent of this problem has already been indicated. We shall here comment on some of the specific evidentiary faults we find. The matter unfortunately does not lend itself to brevity but we shall to the extent possible strive for it.

The four exhibits discussed in pars. 3, 4, 13 and 14 were part of a series of 27 from the files of respondent Lykes (Exs. 81, 82, 84-92, 94, 95, 98-104, 106-111, 113). All 27 were authored by Lykes' Messers. Cocke or O'Kelley who, as above indicated, were vice president for traffic in New Orleans and assistant secretary handling traffic matters in New York, respectively. Both men were called as witnesses in the case by Public Counsel and were subjected to direct and cross examination regarding the exhibits and other-

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wise. Respondents succeeded in having 13 of Mr. Cocke's writings excluded, contending, *inter alia*, that they contained hearsay and opinions and were intra-company communications not admissible against third parties (Exs. 81, 82, 84-92, 94, 95).

Similar objections were then urged against one of the O'Kelley writings and it was excluded (Ex. 98). The same attack was then made on 10 more O'Kelley writings, all comparable to the foregoing rejected exhibits (Exs. 99-104, 106-109). This group was admitted, as all of these exhibits should have been, and the ruling was adhered to despite respondent's lengthy protests that the exhibits were in precisely the same class as those just rejected. Immediately thereafter three similar O'Kelley writings were excluded (Exs. 110, 111, 113). At another stage of the proceeding 21 more Cocke-O'Kelley communications, all comparable to those here discussed, were excluded (Exs. 146-148B, 151-156, 158-163B).

The memorandum of Mr. Farrell quoted in par. 1, an admitted exhibit (Ex. 43), discusses the identical matter Safmarine's agent, Mr. W. H. McGrath, discussed in the letter partially quoted in par. 11, namely, Standard Vacuum's request for a rate reduction on lubricating products (Ex. 116). Mr. McGrath, a States Marine Lines vice president in charge of the Safmarine agency, was a witness in the case, like Mr. Farrell. The McGrath letter was excluded, the objections being that it antedated Public Counsel's "specification of charges" (as did Mr. Farrell's letter), that States Marine was not a party to the case, and that Mr. McGrath testified nothing resulted from the rate discussions, which immaterial fact the letter itself showed. Next, there was admitted, over objections, a similar McGrath letter, but of a later date, regarding discussions among respondents on the rate for tobacco leaf (Ex. 117). Another such McGrath letter, which is quoted in par. 21, was then rejected (Ex. 118). It was objected to not as

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being authored by States Marine, a non-party, but as being an "intra-company" Safmarine communication. It was objected to, also, on the same immaterial ground that Mr. McGrath had testified that no result came out of the rate conference therein mentioned.

The letter to Mr. Farrell by Nedlloyd's agent, Mr. Severiens, quoted in par. 6 as an admitted exhibit, was one of a group of similar letters that Severiens concurrently sent Farrell, Robin/Seas, Dreyfus and Lykes. When more of the group were offered (Exs. 131-134), Farrell's counsel objected, asserting Severiens had not been called as a witness and the letters were "hearsay and unilateral." They were thereupon excluded. Mr. Farrell's reply to Mr. Severiens, also an admitted exhibit quoted in par. 6, shows that these objections had no substance. Ten additional Nedlloyd communications, two of which are quoted in pars. 16 and 17, written by its agent Mr. Drost, who was a witness in the case, were excluded as hearsay because Drost said he got the information for these communications from the USA/South Africa Conference secretary, Mr. Phillips. If that was so, Drost had a reliable contact. Phillips was the agent of Farrell, the sole member of the conference, and was at times the focal point for unapproved rate activity among the respondents, as shown by the admitted evidence in pars. 7 to 9. The exhibit in par. 17 was also objected to as at variance with Drost's testimony that when he wrote "we agreed," he meant only that he had concurred for Nedlloyd in a rate understanding Phillips told him the other respondents had reached. If there is a variation between this explanation and "we agreed," we do not detect it.

About 40 exhibits from the files of Robin Line were offered in evidence by Public Counsel. They had been produced by respondent Moore-McCormack which it will be recalled acquired Robin's property in May 1957 from the since-inactive Seas Shipping Company. All but a handful

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of these exhibits were rejected, principally on the theory that they constituted "admissions" of Seas Shipping, which had not been made a respondent. Mormac's counsel suggested this theory when he reminded that his client had purchased Seas' property, "not its sins." However, to proceed for this technically accurate point to the sweeping notion that these documents were incompetent and inadmissible for any purpose, was quite unjustified.

For one thing, about half the exhibits were written by two of the witnesses in the case, namely, Messrs. Charles H. McGuire and Harold C. Flad who were, as before noted, vice president in charge of traffic and freight agent for Robin, respectively. At least as to this group, therefore, no basis existed for the suggestion that the exhibits were hearsay or the work of an absent or disinterested person. Four of these rejected exhibits are quoted in pars. 18, 19, 20 and 22. Three others involving or written by Mr. Flad had previously been admitted, as shown in pars. 7 to 9. Of the remaining rejected Robin exhibits some were messages sent to Messrs. McGuire or Flad, and the balance were virtually all letters or memos authored by Mr. S. J. Maddock, McGuire's predecessor as Robin's traffic vice president. See pars. 10 and 12 for two Maddock's writings.

Mr. Maddock is deceased and could not be called to testify. The same was true of Mr. F. J. Unver, Farrell's general traffic manager at some of the times in question. There were other participants who for one reason or another could not be called. But their writings were not thereby stripped of all evidentiary value. The authenticity of the documents was beyond question, other indisputable evidence corroborated them by depicting the same rate cooperation among respondents to which the unavailable parties had addressed themselves, giving their writings credibility and trustworthiness. As indicated in our prior comments on hearsay, such exhibits were plainly admissible

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in this administrative proceeding as being reliable, relevant and probative. They were admissible, moreover, not only against the authoring respondent but against other respondents named therein because they showed or tended to show the existence of an agreement among respondents, and that was the heart of the matter under investigation.

The activities of Robin did not change with the passing of Mr. Maddock, nor with the Lines' acquisition by Mormac. On the contrary, as one of the admitted exhibits shows (see par. 5), Robin informed Farrell in June 1955 that with Mr. McGuire's succession to senior position in Robin, Farrell "could expect full cooperation on rates and no rate cutting." Mr. McGuire, Mr. Flad and others who had been employed by Robin/Seas were employed by Mormac when it purchased Robin's property in May 1957 and continued to handle its traffic and rate matters in the trade between the United States and Africa just as they had before. See pars. 7 to 9 and 22.

Public Counsel was able to subpoena material witnesses from each respondent except Louis Dreyfus Lines. A French corporation, Dreyfus traffic interests in the US/South Africa trade were handled by principals located in Paris, including Mr. Jean Cassegrain, and by its general agent in the United States, Ponchelet Marine Corp. of New York, chiefly Mr. J. E. Ponchelet. Mr. Ponchelet was reportedly not connected with Dreyfus at the time of the hearings and his whereabouts were unknown. As in the case of the other respondents, a subpoena was addressed to Dreyfus and its agent, Ponchelet Marine, for relevant documents in the possession or control of Dreyfus or its agent, and in response thereto Dreyfus' counsel produced various files together with an affidavit by their custodian that they contained all documents of the kind described in the subpoena.

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Five documents from these Dreyfus files, being principal-agent correspondence written by Messrs. Ponchelet or Cassegrain, were offered in evidence (Exs. 140-144). The exhibits were objected to by Dreyfus' counsel as "not authenticated by any witness who was produced by the Government." He and other counsel also questioned whether the communications "were actually sent or received" and indeed whether they even related to Dreyfus. The exhibits were thereupon rejected. That they were admissible seems hardly debatable. It was obvious on their face and from the circumstances surrounding their production that the exhibits were authentic and what they purported to be, namely, official Dreyfus correspondence concerning Dreyfus participation in the same concerted rate activity in the US/South Africa trade which was the subject of numerous exhibits in the case composed by other respondents. For an example of this rejected Dreyfus correspondence, see par. 15. For ample additional evidence of Dreyfus participation, see pars. 3, 4, 6, 11-13, 16-18 and 20. What we have said previously as to the evidentiary value of such exhibits, even though no witness was available to testify concerning them, applies with equal force here.

A restricted or fragmented approach to the evidence, which was usually the one taken in this section 15 investigation, can defeat the very purpose for which the investigation was instituted. The conduct proscribed by section 15 includes oral and informal agreements, understandings and arrangements which by their nature can be difficult to detect and prove and may well require the putting together of numerous individual evidentiary items so as to construct an integrated whole that will provide the basis for a conclusion. The respondents here should not have been allowed to isolate and attempt to destroy the documentary proof link by link, in disregard of the interrelated and complementary character of the various links as well as their cumulative delineation of respondents' common course of

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unapproved activity. But for the abundance of the proof that happens to be available here, such an approach might have transformed the entire proceeding into an academic exercise.

We would add one final, and perhaps obvious, comment on the quality of the excluded exhibits. They were authored in the main by experienced, highly-placed officials who were responsible for the all-important traffic phases of large and complex ocean transportation enterprises, in what was a very competitive trade area. Like many a businessman with less at stake, we are quite sure these officials of respondents and their agents had the capacity to know and state accurately anything so significant to their operations as the fact that they had reached an agreement, understanding or arrangement relating to rates with one or more of their competitors. Contrary to contentions advanced by respondents' counsel, such statements did not constitute expressions of legal opinion, nor opinion as to what someone else meant. Respondents' counsel also complained often, even where the author had been examined on the witness stand, that the exhibits were intra-company communications, which was true as to many of them. However, in our view this enhanced rather than detracted from their evidentiary validity because the communications contained completely candid utterances bearing directly on the subject of the inquiry.

We find that the 113 exhibits the Examiner rejected were reliable, relevant and probative and should have been admitted in this proceeding. The Examiner is accordingly overruled and the exhibits are received in evidence. Anticipating the possibility of this result, some of the respondents argue that they should be given the opportunity to meet the evidence thus admitted. The argument is misleading and without substance. No rulings were made on the exhibits until the end of the hearings, in line with procedure the respondents themselves urged. The exhibits had previously

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been tendered and identified and were for all practical purposes a part of the case. Many of the exhibits were the subject of both direct and cross-examination, and in the course thereof the material contents of some of them were also read into the record.

It is to be recalled, moreover, that all the proof in the case relating to possible violations originated with the respondents, so there could have been no surprises. Respondents not only had full opportunity to meet Public Counsel's presentation, they were peculiarly well situated to demolish it if any such evidence existed. They in fact undertook to meet the presentation to the extent they had something to offer. Additionally, at the conclusion of the testimony, but before the admissibility of the exhibits was ruled upon, the Examiner specifically inquired if the respondents had "any further affirmative offerings" and received negative replies. While most of the exhibits respondents had tendered were ultimately withdrawn, they remained physically a part of the record and have been reviewed by us. They do not, however, contain material that could affect our conclusion.

Findings and Conclusion—Section 15 Violations Not Involving Baron Iino. The evidence, of which pars. 1-22 above are but samples, clearly establishes and we find with respect to section 15 violations of respondents other than Baron Iino, in the United States/South and East Africa trade during the years 1954-58, inclusive, the following:

An agreement, or cooperative working arrangement, for the exchange of information relating to rates and related matters and for the fixing of rates, existed during the entire five-year period. It was participated in by all of the respondents and often resulted in the establishment of identical rates adhered to by each of them. From the beginning of 1954 this arrangement included on a regular basis Farrell and Robin/Seas, operators in the Atlantic portion of

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the trade, and to a lesser extent, Lykes, their American counterpart in the Gulf portion of the trade. By no later than April of that year, the arrangement included Safmarine, which operated in both the Atlantic and Gulf portions and for most of the relevant period was a common carrier only outbound from the United States.

At first the cooperation in the Gulf portion of the trade involving Lykes, Dreyfus and Safmarine was less firm, chiefly because of Dreyfus, but even so the discussion and exchanges of rate information resulted in considerable parity of rates. About August 1954, Robin/Seas persuaded Dreyfus, an operator also in the Atlantic segment, "to work together on rates" and thus participate more completely in the arrangement. By the end of 1954 there was much closer Gulf cooperation between Lykes, Dreyfus and Safmarine. By January 1955 Dreyfus was ready to work with the other respondents for a comprehensive "agreement to limit direct competition." Nedlloyd's interests mainly concerned a limited number of commodities moving in the inbound U. S. Atlantic trade. It sailed to Africa from the U. S. Pacific Coast. During 1954 and thereafter it exchanged rate information with the other lines, usually through Farrell's agent, the secretary of the USA/South Africa Conference. This included consultation and concurrence in rate changes, as well as the initiation itself of rate proposals on which it directly secured agreement from the other respondents.

In late 1954 and early 1955 Farrell, Robins/Seas, Lykes, Dreyfus and Safmarine considered in concert and finally agreed to a 15 percent general rate increase for the outbound trade. They put this into effect on March 1, 1955, with the exceptions as to a few commodities. They also concurrently firmed up an understanding for the giving to each other of 48 hours' notice and opportunity for advance discussion of any rate alteration, in which Nedlloyd likewise concurred. In March 1955, shortly after the outbound increase became effective, Dreyfus, Farrell, Robin/Seas and

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Lykes (Safmarine having no interest here) began joint consideration of rate increases for the inbound trade, and certain other tariff matters, and reached agreement thereon by May of 1955. Nedlloyd participated in these negotiations to the extent of its commodity interests through its liaison with Farrell's agent, the conference secretary.

The cooperative arrangement was thereafter maintained between the respondents along the same lines but with ever-increasing closeness. The numerous discussions and conferences they held brought about agreement on the rate levels for specified commodities and groups of commodities, and from time to time on general rate increases, and resulted in their tariff rates being identical on most items by early 1956. The filing by Farrell and Robin/Seas of Agreement 8054, approved by the Board July 2, 1956, changed nothing except possibly to step up the tempo of activity between the signatories. The arrangement continued among all the respondents, whether or not signatory to 8054.

The arrangement was terminated as to Dreyfus, which never signed 8054, upon its suspension of service in the trade in February 1957. Mormac became an active party in the arrangement after it acquired Robin's property and personnel in May 1957, and was such both before and after it signed 8054 in August 1957. Lykes, Nedlloyd and Safmarine, all of whom had continued their regular participation, did not sign 8054 until April 3, 1958, July 28, 1958, and September 10, 1958, respectively, on which latter date the respondents at last brought their long-standing agreement or cooperative working arrangement into compliance with section 15.

We further find and conclude that the respondents did not file immediately with the Board their cooperative working arrangement nor any of their numerous subsidiary rate agreements and understandings, as aforesaid, contrary to section 15 of the Shipping Act, 1916; that the sole agreement which was filed, No. 8054, was not a true and complete

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copy or memorandum of the arrangement in that it failed to disclose all of the parties thereto, never disclosed Dreyfus' participation, and did not fully reveal the remaining parties until September 10, 1958, contrary to section 15; that the arrangement and subsidiary agreements and understandings were carried out by the respondents in the manner aforesaid during the years 1954-58, without the knowledge, much less the approval of the Board, contrary to section 15; and that all of the respondents were in violation of section 15 of the Act beginning at the approximate times indicated in 1954 until September 10, 1958, except that Dreyfus' period of violation ended in February 1957.

Discussion—Section 15 Violations Not Involving Baron Iino. No one would doubt that Agreement 8054, approved July 2, 1956 with Farrell and Robin/Seas as signatories, and adopted on various dates over the next two-plus years by Robin/Mormac, Lykes, Nedlloyd and Safmarine, is an agreement which was required to be filed and approved under section 15 of the Act, failing which the activities therein described were unlawful. It will be recalled that the agreement, which is quite brief in its terms, authorized the parties thereto to discuss and agree on rates to be charged by them and related tariff matters, and also stated that any party might itself alter any rate or tariff matter upon giving at least 48 hours' notice to the other parties. Although essentially the same as the informal arrangement or agreement under which the signatories to 8054, and also Dreyfus, operated throughout the five-year period involved, respondents managed to convince the Examiner that their arrangement did not violate section 15 because, as he puts it, they had "no meeting of the minds" and were not "legally obligated" before 8054.

Inconsistent on its face, this result in our judgment is insupportable on any ground, factual or legal, and it must be set aside. Factually, even the limited proof admitted by the Examiner indicates clearly that the respondents had

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a meeting of the minds for a cooperative rate arrangement and when the entire record is brought into focus the picture of it is most convincing. That record, as has been noted, was largely built of highly incriminating evidence from the files of each respondent (except Baron Iino). Respondents did not offer and could not have had any real answer to that evidence. It is, or at least should be, next to impossible to overcome statements repeatedly written in company correspondence by the president, vice president for traffic, or other official that an "agreement," "commitment," "concurrence" or "understanding" has been reached with one or more competitors regarding the rate level at which transportation will be furnished. It appears to us respondents' inability to provide any answer was why from the outset they fought so strenuously to keep the evidence out of the case, and is why in their argument they only attempt to interpret it.

The Examiner likewise had difficulty in this respect. His report acknowledges that respondents held numerous rate discussions and conferences and that these covered various rate matters including the 15 percent general increase that all of them put into effect on March 1, 1955 and the plan for 48 hours' advance notice of a rate change. The Examiner further found that respondents' discussions and conferences "generally, but not always, resulted in the quotation of similar rates," and by February 1956 had resulted in Robin, Farrell, Lykes, Dreyfus, Nedlloyd and Safmarine having rates "on most items [that] were identical." In our view, such findings logically lead to a conclusion just the opposite from the one the Examiner reached.

We cannot regard obvious anticompetitive activity as though it were normal business conduct. Nor can we regard the use of parallel rates following joint rate discussions as though it were the fortuitous product of "independent judgment" or just the result of "business economics." Both law and reason demanded of us a con-

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siderably more realistic approach than this. Persons subject to the Act who expect us to give credence to such claims should conduct their activities in a way that is consistent with the claims. As we recently stated in *Unapproved Section 15 Agreement—West Coast South America Trade* (Dkt. 883, decided Dec. 7, 1961; 6 F. M. C. —), which was found not to be a rate-fixing situation:

“ . . . we deem it a serious matter for parties subject to the Act to engage in exchanging rate information without our knowledge. In some circumstances, the exchange of rate information may not affect the public interest. But the natural consequences of such activity can clearly be a step toward or the very basis of improper practices, and the activity should therefore be avoided.”

Here the respondents, in their frequent communications, were not simply keeping one another posted, any more than they were exchanging reminiscences. They were engaged in what is most aptly described as a cooperative working arrangement for the joint fixing or regulating of transportation rates, which was unauthorized and therefore improper. The manifest objective of this arrangement was to achieve agreement or understanding on the level of such rates and the record everywhere shows that respondents accomplished this to a substantial degree. It is quite immaterial that the arrangement did not in every instance produce firm or complete accord. Even if no firm results had been reached—a highly unlikely situation—the agreement to cooperate in attempting to fix rates would have been improper. However, respondents' arrangement, encompassing as it did all the common carriers in the trade during much of the relevant period, was quite successful in producing concrete results. It “generally . . . resulted in the quotation of similar rates” by all of them, as the Examiner himself found.

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It may also be recalled at this juncture that 8054, the section 15 agreement by which respondents finally formalized their arrangement, stipulates that a party may individually alter a rate subject to giving at least 48 hours' notice to the other parties. This is exactly the same sort of reservation of so-called "independence" that influenced the Examiner to conclude the respondents had "no meeting of the minds" and no agreement, although 8054 is plainly an agreement. Such a notice provision, moreover, does not reflect independence. It demonstrates anticompetitive agreement. Its effect is to assure the parties an opportunity either to institute simultaneously the proposed rate change, dissuade the proponent from effectuating it, or at the least talk him into an acceptable compromise.

As a matter of law the Examiner's decision decimates section 15. It would read out of the section oral, tacit or general agreements, understandings and arrangements. These, however, are even more effective anti-competitive vehicles than formal, detailed and legally-binding agreements. Section 15 is not concerned with formality but with the actual effect of the arrangement. The Examiner's construction of the section cannot be reconciled with its language or its history. It reflects, moreover, a fundamentally erroneous concept of the section's meaning and function which we must emphatically reject. As to that meaning and function, we made the following pertinent comments in the *Pacific Coast European Conference* case (Dkt. 948, decided December 21, 1961; 6 F. M. C. ———):

"Section 15 is a grant of limited legislative permission for carriers and others operating in this Nation's foreign water-borne commerce to engage in certain forms of concerted activity which would otherwise be unlawful under the antitrust laws, but only if and to the extent approved by the Commission and only so long as approved by it. * * * This appears

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from the face of the statute. In addition, the legislative history of section 15 makes plain that Congress granted an antitrust exemption only because it envisioned that the permitted activities would be subjected to constant and effective government control and regulation.

"The House Merchant Marine and Fisheries Committee in the report of its Investigation of Shipping Combinations, the legislative study underlying the Shipping Act, 1916, made an exhaustive analysis of the problems presented by anticompetitive combinations in our water-borne foreign commerce. The Committee pointed out that Congress had but two courses. It could either restore unrestricted competition by prohibiting the anti-competitive agreements and understandings then widely used, or it could recognize these agreements and understandings along lines which would eliminate the evils flowing therefrom. While admitting the advantages of allowing steamship agreements and conferences in our foreign commerce, the Committee was not disposed to recognize them 'unless the same are brought under some form of effective government supervision.' The Committee pointed out that to permit such agreements without this supervision would mean giving the parties an unrestricted right of action, which it definitely did not favor.*

"This philosophy took shape and was enacted as section 15 of the Shipping Act, 1916, confiding to the agency administering the Act extensive powers of supervision and control as the condition precedent to any of the concerted activities covered by the section's

** Committee on the Merchant Marine and Fisheries, House of Representatives, 63rd Congress, Report of Investigation of Shipping Combinations under House Resolution 587 in 4 volumes, commonly referred to as the 'Alexander Report,' Vol. 4, pp. 415-17."

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rather all-inclusive language. As was pointed out by the court in *Isbrandtsen Co., Inc. v. United States*, 211 F. 2d 51 (D. C. Cir. 1954), in discussing the authority to permit antitrust exemptions under section 15:

“ ‘The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. (211 F. 2d, at page 57.)’ ”

Congress was fully aware, furthermore, that its plan for “effective government supervision” would be largely frustrated unless the Act were made broadly applicable to all agreements, understandings and arrangements including particularly the kind of informal arrangement which existed among the respondents here. The Alexander Report, *supra*, summarized the problem as follows (pp. 293-94):

“Reference should here be made (1) to the tendency toward oral understandings, instead of written agreements, between the lines operating to and from ports of the United States, and (2) the care which has been exercised to prevent agreements and understandings from becoming public. Oral understandings were described by various witnesses as ‘safer’ than written agreements, and the preceding chapters refer not only to many agreements which were of an oral nature from their inception but to several instances where written agreements were terminated and oral understandings substituted, the witnesses however admitted that the lines continue to follow the same rates and conditions which were previously observed under the written agreements. In fact, witnesses repeatedly drew the

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distinction between formal written agreements and oral or 'tacit' understandings.

"While not involving as strong a moral obligation as written agreements, the evidence shows that for all practical purposes oral arrangements are quite as effective. Judging from the manner in which the lines observed the same, the existing oral understandings give unmistakable evidence of the high order of integrity prevailing in modern business, and justify fully the phrase 'gentlemen's agreements.' Written agreements seem to have accomplished their purpose in many trades and are apparently no longer needed. The lines in some instances need not even meet in conference; they may avoid every appearance and every act which would seem to show the existence of an agreement or understanding; and yet operate in the same spirit of harmony that would prevail if a written agreement existed."

Accordingly, section 15 requires—as it has for the 45 years since enacted—the filing of a copy, or "if oral" a true and complete memorandum, of "every agreement" covering any of the wide range of anticompetitive activities therein mentioned, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The word "agreement" is specifically defined to include "conferences, understandings, and other arrangements."⁵ The language of the section thus clearly em-

⁵ The relevant portion of section 15 of the Shipping Act, 1916 (46 U. S. C. 814), which was not changed by the amendments of October 3, 1961 (Public Law 87-346, 75 Stat. 762) except to substitute "Commission" for "board," reads as follows:

"SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Board [now Commission] a true copy, or, if oral, a true and complete

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braces every agreement, understanding, or arrangement, whether formal or informal, written or oral, detailed or general. The section has been applied in other cases to informal working arrangements not nearly so conspicuous as this one. For example, see *Wharfage Charges & Practices at Boston*, 2 U. S. M. C. 245, 248, 251 (1940) and *Maatschappij "Zeetransport N. V. et al. v. Anchor Line Ltd. et al.* (Dkt. 833, decided January 23, 1961), 6 F. M. B. —; aff'd *Anchor Line Ltd. v. F. M. C.*, — F. 2d —, D. C. Cir. Feb. 1962.

Respondents Farrell, Nedlloyd and Safmarine, and to some extent Lykes, object to having been "charged" with "failure to file" agreements.* They argue that section 15

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memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

* Respondents Farrell and Nedlloyd also contend the Board's orders posed no question of failure to file agreements. We think they did, both expressly and by necessary implication. The orders recited that agreements might have existed among respondents which "have not required to be drawn with the specificity usually found in such approval." Even assuming they lacked some precision, they were orders of investigation, not an indictment nor a penal complaint, and not required to be drawn with the specificity usually found in such papers. Moreover, respondents' position was and is that no agree-

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only makes it an offense "to carry out" an agreement, citing in support thereof certain Board decisions and testimony given before a Congressional Committee by two Board officials. We are aware that on occasion past there has been some *obiter dicta* on this subject that might comfort respondents but we have found no cases actually ruling on the question until early 1961, and they reject rather than support respondents' interpretation, as the statute itself does. If there has been any past doubt, we fail to see why.⁷

At the root of respondents' position is the following language which was included in the fourth paragraph of the original section 15, and is retained in the same paragraph by the amendments to the section added by Public Law 87-346 approved October 3, 1961 (75 Stat. 762):

" * * * before approval or after disapproval it shall be unlawful to carry out * * * any such agreement, modification, or cancellation."

On the other hand, section 15 opens with the flat command that agreements "shall" be filed "immediately,"

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ments but 8054 existed. It is undisputed that the Board's orders raised the question of respondents' effectuating unapproved section 15 agreements other than 8054. They necessarily put into issue whether any such other agreements existed and had not been filed.

⁷ Respondents' citations are: *In re Pan-American S. S. Co., et al.*, 2 U. S. M. C. 693, 697 (1943); *City of Portland v. Pacific Westbound Conf.*, 4 F. M. B. 664, 674 (1955); *Pacific Coast European Conf.—Limitation of Membership*, 5 F. M. B. 39, 45 (1956); *American-Union Transport v. River Plate & Brazil Confs.*, 5 F. M. B. 216, 224 (1957); *Pacific Coast European Conf.—Limitation on Membership*, 5 F. M. B. 247 (1957); *Associated-Banning Co. v. Matson Nav. Co.*, 5 F. M. B. 336, 343 (1957); *Monopoly Problems in Regulated Industries*, Hearings of Antitrust Subcommittee (Celler Committee) of House Judiciary Committee, 86th Cong., 1st Sess., Part 1, Vol. 1, pp. 71-75.

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which obviously means without delay or at once, if not sooner. Moreover, by the final paragraph of section 15 a penalty is imposed for violating "any provision" of the section. Unless the filing requirement is somehow to be interpreted out of the section, it must be given effect as a provision and quite a positive one, for violation of which the penalties applies. We will not make any such attempt to expunge the provision but will construe it as written, fortified by the belief that failure immediately to file an anti-competitive agreement was intended by Congress to be a distinct violation of section 15.

There is nothing perfunctory about the language in question. It does not say file if and when you plan to effectuate, nor does it indulge in the fantasy that an anti-competitive arrangement will be kept on ice and not effectuated. On the contrary, it assumes effectuation is a foregone conclusion and that it is likely to be clandestine. The language is therefore an urgent injunction with a clear purpose. Effective government supervision, which was the cornerstone of the whole regulatory plan Congress embodied in section 15, would be greatly handicapped if not defeated were parties to anticompetitive agreements allowed to file them at their convenience, which could be never. Supervision cannot be effective, and may well be nonexistent, if the supervisor is uninformed.

As before noted, Congress took particular cognizance of the industry's tendency toward the widespread use of informal, tacit and secret agreements and of the difficulties of detecting them. We think it did not want the parties to such arrangements in a position to effectuate them at will, under a clandestine cloak. It therefore undertook to compel immediate disclosure of anticompetitive arrangements by requiring that they be put on record and exposed to government supervision forthwith, otherwise the statute was violated.

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The Board ruled over a year ago that failure to file an agreement is a violation of section 15. *Maatschappij "Zee-transport"*, *supra*; *Agreements and Practices Pertaining to Freightage Agreement—Gulf & So. Atl. Havana Conf.* (Dkts. 849, 851, 854, decided February 2, 1961) 6 F. M. B. —. And, though it may not have expressly so held, we think the Supreme Court as long ago as 1932 clearly indicated that section 15 was violated by failure to file an agreement. *U. S. Navigation Co. v. Cunard S.S. Co.*, 284 U. S. 474, 486-87 (1932). We note, also, that Congress, apparently troubled by the same *obiter* which we mentioned above, added language to section 15 in its recent revision thereof (Public Law 87-346, *supra*) making it even more plain (if that is possible) that failure to file immediately is a violation.

Statutory Violations Involving Baron Iino. The Board's orders of January 15 and June 27, 1960 enlarged this proceeding to include investigation into (1) possible violation of section 14, Second of the Act (*i.e.*, use of a vessel or vessels for the purpose of preventing competition by driving another carrier out of the trade) by Farrell and/or Robin/Mormac during 1957-59 in the African trade, the other carrier being Baron Iino or its predecessor Baron Line; and (2) possible violation of section 15 by reason of agreements covering certain commodities in the same trade during 1958-59 and thereafter, between the six original respondents and Baron Iino.

Baron Iino in January 1959 succeeded Baron Line in the trade, the latter having operated therein since the end of 1957. Both Barons were represented in the United States by U. S. Navigation Co. and both gave the respondents what might be termed in the vernacular "a hard time" by undercutting their rates, at least on some commodities, and by refusing to join Agreement 8054 unless given rate concessions. The evidence adduced with respect to the section 14 violation indicated that Farrell and Robin/Mormac con-

Federal Maritime Commission Report of April 9, 1962

sidered taking measures against Baron such as "blanketing" its sailings and might have made threats to do so, but these were not carried out.

The question of possible section 15 violations involved Kraft paper, wool and bulk tallow and stemmed from conversations on a few occasions over a period of about 18 months, initially between Baron's agent and Farrell, Robin/Mormac and Lykes and later between Baron's agent and Safmarine's agent, the latter acting as representative of the other respondents. The conversations were initiated by the respondents because of their desire to have Baron join the group, and included the lesser possibility that some understanding might be obtained on specific commodities. However, Baron, as before noted, appears to have remained generally uncooperative, at least absent concessions. Baron's agent denied having any agreement, understanding or arrangement with the other respondents at any time. The proof tends to support this claim except as to tallow, where it casts some doubt on the claim, but does not destroy it as occurred in the section 15 violations discussed above.

With respect to tallow only, Public Counsel urges that section 15 was violated. The tallow rate had been driven down deeply during 1958 and was \$18 per long ton by early 1959, which was less than break-even for at least one of the 8054 carriers. Precisely what happened from this time on is controversial and, to us, somewhat confusing. The 8054 group apparently decided to publish a \$20 rate effective May 1, 1959 and beginning in February 1959 filed tariff amendments covering same. We are unable to find, however, as we are asked to do, that prior to this the 8054 group had a "commitment" from Baron Iino that it would use the \$20 rate. Nor can we find that a subsequent increase in the rate to \$22 effective July 1, 1959, was based on Baron Iino's agreement.

It is true that a couple of the conversations between the agents of Baron Iino and Safmarine occurred during this

Federal Maritime Commission Report of April 9, 1962

period but it is not clear from the testimony of the participants that Baron Iino could be said to have agreed on tallow rates. In view of such testimony, and Baron's record of disagreeing rather than agreeing, we are disposed to view the remaining evidence on this matter as insufficient to establish the violation. This is another instance, however, where a carrier who claims to be free of unapproved anticompetitive alliance, has come close to potentially serious difficulty by failing to avoid questionable involvement with its competitors.

In accord with the foregoing, respondents Farrell and Robin/Mormac are found not to have violated section 14, Second of the Act, and Baron Iino and the other respondents are found not to have violated section 15 of the Act, in respect of the matters referred to in the Board's orders of January 15 and June 27, 1960 which involve Baron Iino or its predecessor Baron Line.

Matters in Extenuation. While we have stated our findings and conclusions and the reasons therefor, there remain undiscussed several contentions which are particularly urged by the American respondents, both defensively and in extenuation or mitigation. In reality they are matters in extenuation and as such may be material to the question of punishment for past violations but are not relevant to anything within the jurisdiction or intent of this administrative investigation. Nevertheless, some discussion of the contentions appears in order in view of the misleading and erroneous influence they had on the Examiner. He accepted as justifying completely the conduct of Farrell, Robin and Lykes the theory that their activities had been directed or sanctioned by the former Maritime Commission, the Board, or their representatives continuously since back in 1938 and up to and inclusive of the 1954-58 period under investigation. The background of this is as follows:

Operating subsidy contracts in the United States/South and East Africa trade were concurrently sought after pas-

Federal Maritime Commission Report of April 9, 1962

sage of the Merchant Marine Act, 1936 (46 U. S. C. 1101, 1171) by both Robin/Seas and Farrell's predecessor, American South African Line, Inc., then the only American carriers in the trade. The former Commission in 1938 decided that both carriers should receive subsidy on an experimental basis but that efforts to effect their merger should continue and if not successful, arrangements should be worked out "covering sailing dates, rates, and pooling of homebound cargo" so as to eliminate to the extent possible competition between two subsidized American lines and enable them "to cooperate in competing against the foreign lines now carrying the bulk of the commerce in this trade." *American South African Line, Inc.—Subsidy S. and E. Africa*, 3 U. S. M. C. 277, 287 (1938). Conformable to this decision, subsidy contracts were awarded the two companies which stipulated they would "establish, publish, and maintain rates, charges" etc. on a basis "satisfactory to the Commission."

Lykes entered the Gulf portion of the trade in January 1941, there being no other American carrier in it at the time. Because subsidized in other trades, Lykes had to and did obtain Commission permission for this venture. The Commission required it to carry certain homebound cargoes. Lykes' vice president testified that it was told by Commission employees to consult with Farrell and Robin on rates for certain strategic inbound, and certain competitive outbound, commodities. During the war years Farrell, Robin and Lykes operated ships in the trade as general agents of the War Shipping Administration, and received copies of the same W. S. A. rate advices. For a time after the war, when they had resumed operations for their own account, they voluntarily continued, at W. S. A.'s suggestion, to maintain rates established by W. S. A. in its tariffs. After the war, also, Lykes obtained subsidy for its Gulf/Africa service.

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When Mormac took over the Robin operation in 1957, its subsidy contract was amended initially to include the same provision that had been inserted as aforesaid in the Farrell and Robin/Seas subsidy contracts back in 1938 but this was almost immediately changed, at the request of Maritime's Office of Government Aid, in favor of a "coordination" clause similar to one Mormac already had in another subsidy contract. This substituted clause was likewise inserted in Farrell's contract in lieu of the prior provision. The clause states that the operator will from time to time as required by the United States "coordinate the spacing, regularity and frequency of its sailings" in conjunction with other subsidized services on the trade route, and gives the Government's consent to such prescribed coordination for the purposes of Art. II-18(c) of the subsidy contract and any other contractual or statutory provision requiring that consent. Besides the foregoing, it appears there occurred through the years sporadic contacts or discussions, of uncertain content, between the subsidized operators and Maritime personnel.

The mere recital of this background seems to us to show that it in no way supports the subsidized respondents' claim of agency knowledge and consent to the rate-fixing activities hereinabove set forth, nor the Examiner's finding that these respondents were only maintaining uniform rates "in compliance with" subsidy contracts and agency advices. The 1957 coordination clause is a routine subsidy contract provision covering sailings and does not mention rates. Assuming the prior 1938 provision and the advice Lykes says it received, were factors in the early rate cooperation among Farrell, Robin/Seas and Lykes, that cooperation was not authorized to be undertaken without reference to section 15's requirements. One of its purposes, also, was to provide for competition against the foreign lines.

Federal Maritime Commission Report of April 9, 1962

The record does not show that Maritime personnel told respondents section 15 could be disregarded, or even that the subject came up. The burden was on respondents to raise it, and in any event to file under section 15 and set forth the arrangement they had. It is interesting to recall in this regard that Lykes did raise the subject with its colleagues in December 1954, and expressed its opinion that a "definite agreement" existed and "must be filed with the FMB." The record likewise does not show that anything like the arrangement which prevailed during the 1954-58 period was revealed to or known to the Board or its personnel, as successors to the Commission, much less that it was directed or approved by them. That arrangement, involving as it mostly did, widespread rate-fixing among all carriers in the trade, citizen and non-citizen alike, was not at all what the 1938 provision of the subsidy contracts envisaged. The American carriers were not united to compete with the foreign-flag lines, they were acting in concert with such lines to eliminate competition.

Respondents' argument that the arrangement "promoted stability," aided the subsidy program, was "in the public interest," and not objectionable under section 15, is quite beside the point. Such matters were for the Board, the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves. Respondents prevented any Board consideration by ignoring the eminently clear requirements of section 15 and thus frustrated it for years. We think it impossible for anyone now to state that what transpired between respondents was all well and good but even if this were not so, the impact of the statute manifestly cannot be made to depend on the *ex post facto* chance that the violation was not harmful. Section 15 may as well be scrapped as to attempt to administer it in this fashion.

Federal Maritime Commission Order of April 9, 1962

It goes without saying that we find untenable the suggestion that respondents' arrangement constituted a "technical" violation of the law. It should be noted, furthermore, that section 15 affords little room for so-called technical violations. To us the breadth and force of its language literally implore attention and obedience, or at the very least inquiry if in any doubt as to the propriety of proposed conduct.

Since the respondents are not currently acting contrary to section 15, we have no occasion to issue an order against them and the proceeding will be discontinued. In accordance with our usual practice where statutory violations have been found, the matter will be referred to the Department of Justice for appropriate action.

By the Commission, April 9, 1962.

THOMAS LINI
Secretary

Federal Maritime Commission Order of April 9, 1962

At a Session of the FEDERAL MARITIME COMMISSION held
at its office in Washington, D. C., this 9th day of
April, A.D. 1962

No. 882

UNAPPROVED SECTION 15 AGREEMENTS—
SOUTH AFRICAN TRADE

This proceeding was instituted by our predecessor, the Federal Maritime Board, upon its own motion. Investigation of the matters involved having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

*Farrell Lines, Inc. Petition for Reconsideration of
May 10, 1962*

It is ordered, That this proceeding be and it is hereby discontinued.

By the Commission.

THOMAS LISI
Secretary

**Farrell lines, Inc. Petition for Reconsideration of
May 10, 1962**

BEFORE THE
FEDERAL MARITIME COMMISSION
Docket No. 882

UNAPPROVED SECTION 15 AGREEMENTS—
SOUTH AFRICAN TRADE

Respondent Farrell Lines Incorporated, by its attorneys, respectfully requests the Commission to: (1) reconsider its report and order of April 9, 1962 to the extent the Commission therein finds that petitioner made and carried out an arrangement or agreement with other respondent lines during the period 1954-1958 in violation of Section 15 of the Shipping Act, 1916; (2) vacate said finding of violation, including the facts and reasons asserted in the Commission report, and in lieu thereof find that the alleged 1954-1958 agreement was not proven, and adopt in support of such finding the facts, grounds, and conclusions set forth in petitioners' Reply Brief to the Examiner dated March 2, 1961 (at pp. 3-26, 32-37, Appendix A pp. 41-54) and its Reply to Exceptions of the Public Counsel to Examiner's Recommended Decision, dated September

*Farrell Lines, Inc. Petition for Reconsideration of
May 10, 1962*

14, 1961, or in the alternative adopt the findings and conclusions set forth in the Examiner's Recommended Decision; (3) not refer the proceeding to the Department of Justice; and (4) dismiss the proceedings on the ground that petitioner has not violated the Shipping Act, 1916.

Reconsideration is requested for the reasons and on the grounds asserted not only in petitioner's reply briefs, referred to above, but also those set forth in the petitions for reconsideration being filed by Lykes, Robin Line, Nedlloyd and South African Marine Corp., with which petitioner concurs and will not here repeat in order not to burden the Commission with needless repetition.

Petitioner does not by this petition waive any of its legal rights and expressly reserves all positions, objections, and exceptions noted throughout the proceeding in Docket No. 882, including those set forth in its Reply Brief to the Examiner, and in its Reply to Exceptions of Public Counsel to Examiner's Recommended Decision.

Oral argument is requested.

Respectfully submitted,

ELMER C. MADDY,

RONALD A. CAPONE,

KIRLIN, CAMPBELL & KEATING,

120 Broadway,

New York 5, N. Y.

and

917 Munsey Building,

Washington 4, D. C.,

Counsel for Farrell Lines Incorporated.

Dated: May 10, 1962.

***Order Denying Petitions for Reconsideration of
June 19, 1962***

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of May, 1962, served a copy of the foregoing petition for reconsideration by hand on Hearing Counsel and by first class mail, postage prepaid to all other parties of record.

RONALD A. CAPONE.

***Order Denying Petitions for Reconsideration of
June 19, 1962***

Served
June 19, 1962
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

Docket No. 882

**UNAPPROVED SECTION 15 AGREEMENTS—
SOUTH AFRICAN TRADE**

The Commission, in its report of April 9, 1962, found that all of the respondents in this proceeding (except one) made and carried out an unfiled and unapproved cooperative working arrangement or agreement for the fixing of transportation rates and related matters affecting the trade between the United States and South and East Africa, in violation of section 15 of the Shipping Act, 1916. However, no order was issued against respondents since the activities in question were found to have ceased in September 1958.

*Order Denying Petitions for Reconsideration of
June 19, 1962*

Respondents have filed petitions seeking the reopening and reconsideration of the proceeding for various reasons. In the main, the several petitions allege that we misinterpreted section 15, that our decision was not in accord with the evidence and constituted an unwarranted departure from the Examiner's recommended decision, that we improperly relied upon hearsay evidence, and that the proceeding was at least "quasi penal" in nature and should have been handled accordingly. Respondent Lykes Bros. Steamship Co. also renews the contention that the activity we condemned was authorized by decision or interpretation of our predecessors.

There is nothing materially new in these allegations and the supporting arguments advanced by the respondents. They were all expressly or necessarily considered in our report of April 9, 1962. In that report we took great pains to explain the basis of our decision in detail. We rather copiously reviewed the evidence, the nature of the proceeding, and the applicable legal principles, citing references to the pertinent authorities. A reexamination of our findings and conclusions in light of the arguments and cases relied on in the several petitions of respondents only reaffirms the correctness of the April 9 report.

Some of the respondent claim they are unable to determine what their future conduct should be, despite the extraordinary lengths to which our report goes in spelling this out. Instead of attacking the report, we believe the respondents would be better advised to give it more objective consideration to the end that they may hereafter avoid any reoccurrence of proscribed section 15 activity. Especially is this so when it is recalled that respondents have been subjected to no order by the Commission in this matter. As regards referral of the case to the Department of Justice, referral as our decision made plain is routinely made where past violations of the law are found and the fact that this is done neither alters the character of, nor

*Public Counsel Statement of Violations of
September 6, 1960*

is it relevant to, the proceedings before this Commission. The separate question of imposing sanctions for such violations rests within the province of the Attorney General and the courts.

IT IS THEREFORE ORDERED, That respondents' petitions for reopening and reconsideration are denied.

By the Commission, June 19, 1962.

THOMAS LISI,
Secretary.

**Public Counsel Statement of Violations of
September 6, 1960**

BEFORE THE FEDERAL MARITIME BOARD

Docket No. 882

**UNAPPROVED SECTION 15 AGREEMENTS—
SOUTH AFRICAN TRADE**

In compliance with the Examiner's direction, Public Counsel represent that they will urge that the respondents have violated the Shipping Act, 1916, in the following regards:

1. That some time during the months of December 1954 and January 1955, all of the respondents named in the Board's order of investigation, *viz*:

Louis Dreyfus Lines—joint services of Louis Dreyfus
et cie, Buries Markest, Ltd. (Dreyfus)

*Public Counsel Statement of Violations of
September 6, 1960*

Farrell Lines Incorporated (Farrell)
Lykes Bros. Steamship Co., Inc. (Lykes)
Nedlloyd Line—joint service of N. V. Stoomvaart
Maatschappij "Nederland" Koninklijke Rotter-
damsche Lloyd, N. V. (Nedlloyd)
Robin Line (Division of Moore-McCormack) (Robin)
South African Marine Corporation, Ltd. (Safmarine)

orally agreed with each other that each would increase the freight rates charged by each for the transportation of goods between ports in the United States and ports in South and East Africa, and further entered into a new agreement or reaffirmed a pre-existing agreement that in the future no respondent would change a freight rate in said trade without first giving some advance notice to the other respondents and discussing said change with other respondents; that a complete memorandum of such agreement was not filed immediately with the Federal Maritime Board as required by section 15 of the Shipping Act, 1916; that the failure to file immediately the terms of this agreement with the Board constituted a violation of Section 15 of the Act; that this violation continued until September 10, 1958,¹ at which time Safmarine became a member of Federal Maritime Board Agreement No. 8054; that the said agreement was carried out from time to time during the years 1955-1958 by all of the aforementioned respondents by each conferring with one or more of the others and giving and receiving advance notice of an intent to change a particular rate or rates or commodity classification or classifications; and that such exchanges between respondents did not constitute separate violations of said Section 15 but rather are merely evidence of a single, continuing violation.

¹ With the exception of respondent Dreyfus who ceased to operate in the trade in February 1957 and thus was in violation only through that time.

*Public Counsel Statement of Violations of
September 6, 1960*

2. That, in the alternative, respondents Farrell, Lykes, and Robin did enter into an agreement as aforesaid and that such agreement was not immediately filed and was carried out as aforesaid, in violation of Section 15; that if respondents Dreyfus, Safmarine, and Nedlloyd did not enter into an agreement as aforesaid, they each conformed to an agreement of the aforesaid terms for the period aforesaid; that neither Dreyfus nor Safmarine, nor Nedlloyd did immediately file with the Federal Maritime Board a complete memorandum of the agreement to which they were conforming; that such failure to file immediately the terms of such agreement constituted a violation of section 15 of the Shipping Act, 1916; that this violation continued until September 10, 1958,² at which time Safmarine became a member of Federal Maritime Board Agreement No. 8054; that such conformity is evidenced by the latter three persons mentioned in this paragraph, each conferring from time to time with one or more of the persons mentioned in paragraph one, *supra*, and giving and receiving advance notice of intent to change a particular rate or rates or commodity classification or classifications; and that such exchanges between respondents did not constitute separate violations of said Section 15 but rather are merely evidence of a single, continuing violation.

3. That during the month of June 1959, respondents Lykes, Robin, Farrell, Safmarine and Baron Iino each agreed with the others to establish a rate identical to the rate of the others for the transportation of tallow from the United States to South and East Africa; or in the alternative that respondents Lykes, Robin, Farrell, and Safmarine each agreed with the others to establish a rate identical to the rate of the others for the transportation of tallow from the United States to South and East Africa,

² See Note 1, *supra*.

*Public Counsel Statement of Violations of
September 6, 1960*

and that respondent Baron Iino did during June 1959 commence to conform to such agreement; that the failure of Lykes, Robin, Farrell, Safmarine, and Baron Iino to file immediately with the Board a complete memorandum of such agreement constituted a violation of Section 15 of the Shipping Act, 1916, or that if Baron Iino did not so agree with respondents Lykes, Robin, Farrell, and Safmarine, Baron Iino's failure to file immediately with the Board a copy of the said agreement to which it was conforming constituted a violation of Section 15 of the Shipping Act, 1916; and that such violation continues until the present.

4. That prior to entering into the agreement or understanding indicated in paragraph (1), *supra*, all respondents, excluding Baron Iino, had upon occasion agreed with each other upon rates and practices affecting the trade between the United States and South and East Africa, some of such agreements being as follows.³

A. During the month of August 1954 respondents Farrell, Robin, Lykes and Safmarine agreed to quote the same rate for the transportation of fishmeal in said trade.

B. During the month of August 1954 respondents Farrell, Robin, Nedlloyd and Dreyfus agreed to quote the same rate and conditions for the transportation of lepidolite in said trade.

C. During the month of August 1954 or September 1954 respondent Dreyfus agreed with respondent Robin that each would inform the other of any intended change in rates for the transportation of goods in said trade prior to instituting such a change.

³ The sole purpose of Public Counsel's urging the existence of these agreements or understandings is to furnish the Board with some background to the violations alleged in paragraph (1), *supra*.

*Public Counsel Statement of Violations of
September 6, 1960*

Public Counsel will not urge a finding that respondents Farrell or Robin have violated section 14, Second of the Shipping Act, 1916. Nor will Public Counsel urge that any of the respondents be found to have violated section 15 of the Shipping Act, 1916, in the fashion indicated by paragraphs numbered (1) and (3) of the Board's Supplemental Order of July 13, 1960.

Respectfully submitted,

EDWARD APTAKER
Assistant General Counsel
Division of Regulations

ROBERT B. HOOD, JR.
Public Counsel

Washington, D. C.
September 6, 1960

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing via first-class mail, postage prepaid, a copy to each such party.

Dated at Washington, D. C., this 6th day of September 1960.

ROBERT B. HOOD, JR.

USCOMM-MA-DC

Opening Brief of Public Counsel of December 21, 1960

BEFORE THE FEDERAL MARITIME BOARD

Docket No. 882

**UNAPPROVED SECTION 15 AGREEMENTS—VIOLATION OF
SECTION 14, SECOND—SOUTH AFRICAN TRADE**

EDWARD APTAKER

**Assistant General Counsel
Division of Regulations**

ROBERT B. HOOD, JR.

Public Counsel

Washington 25, D. C.
December 21, 1960

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[2] A prehearing conference was held in Washington, D. C., on February 10, 1960. During that conference, the Examiner directed Public Counsel to furnish to the respondents certain information in advance of the hearing. On February 15, 1960, Public Counsel moved the Examiner to grant Public Counsel discovery of certain records and facts, or in the alternative, to issue *subpoenas duces tecum* requiring the respondents to produce certain records. On March 10, 1960, the Examiner denied Public Counsel's motion; but upon Public Counsel's motion for reconsideration, the Examiner granted the application for *subpoenas duces tecum*. A hearing was convened in Washington, D. C., on May 2, 1960, for the return of the *subpoenas duces tecum*. Overruling the contention of Public Counsel that it was unnecessary to swear and examine witnesses appearing in response to *subpoenas duces tecum*, the Exam-

Opening Brief of Public Counsel of December 21, 1960

iner directed that the corporate officers who had appeared with the requested documents be sworn and testify.

• • •

[4] Public Counsel filed on September 6, 1960, a further particularization of violations which they intended to assert.² On September 12, 1960, respondent Nedlloyd by letter informed the Examiner that it considered Public Counsel's filing of September 6, 1960, insufficient, and therefore would take the position at the resumed hearing that the hearing should not go forward until further particulars were furnished. On October 6, 1960, respondent Baron Iino filed a substantially similar letter.

Hearings resumed at New York, on October 13, 1960. At the New York session, Public Counsel further examined two witnesses who had testified in Washington on matters relating to that portion of the investigation initiated by the Board's order of June 27, 1960, *supra*, i.e., the question whether certain unlawful agreements with Baron Iino Line had been entered into and carried out. Thereupon, Public Counsel rested their case.

The respondents then proceeded to cross-examine the witnesses called by Public Counsel (all but one of whom were officers or agents of the respondents), and offered no direct testimony or evidence of their own.

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² Public Counsel's filing of September 6, 1960, declared that if certain of the respondents were not "parties" to any agreement under consideration, Public Counsel would in the alternative contend that such respondents did "conform in whole or in part" to such agreements, and in that respect did violate Section 15 unless a copy of such agreement was filed immediately with, and approved by the Board. The Examiner, however, ruled that no evidence relating to any carriers' "conforming" to an agreement between others would be admitted (Tr. 566).

Opening Brief of Public Counsel of December 21, 1960

[6] (c) Agreement No. 8054 originated between Farrell and Robin, and was approved by the Board on July 2, 1956. The other carriers became parties on the following effective dates: Lykes, April 3, 1958; Safmarine, September 10, 1958; Neddloyd, July 28, 1958; Kawasaki Kisen Kaisha, Ltd. and Seaford Shipping Co., May 26, 1959⁵ (Ex. 221). Respondent Dreyfus never became a signatory to the agreement, having left the trade in February of 1957 (Ex. 1).

(d) Agreement No. 8054 is a reduction to writing and thus merely a formalization of the general form of cooperation which had preexisted between the respondents.

(e) The only other agreement embracing the United States/South and East Africa trade currently approved by the Board is the Gulf/South and East African Conference Agreement (No. 7780) between Lykes and Safmarine, the latter becoming a party thereto during the pendency of this docket (Tr. 300). Before Safmarine became a party, Lykes was the only member of that conference operating in the Gulf/South and East Africa trade during the period 1952 through August 1960 (Tr. 301).

[7] (f) There have been two other approved agreements in the trade. Agreement No. 3578, originally approved October 22, 1934, is the U.S.A./South Africa Conference Agreement (outbound trade). The secretary of this Conference, during times pertinent to this inquiry, was J. M. Phillips. During the years following World War II, Farrell was the only one of the several nominal members of this Conference which was actually operating any service in the trade covered by the agreement. The Board

⁵ This joint service of Kawasaki Kisen Kaisha, Ltd., and Seaford Shipping Co. is the only carrier currently engaged in the United States/South and East Africa trade which is not named as a respondent herein.

Opening Brief of Public Counsel of December 21, 1960

disapproved Agreement No. 3578, effective April 1, 1960, for the reason that it had only one party serving the trade.

Agreement No. 3579, also originally approved October 22, 1934, is the South Africa/U.S.A. Conference Agreement (inbound trade). The comments made above with respect to Agreement No. 3578 are applicable as well to Agreement No. 3579. It was disapproved as of April 1, 1960.

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[12] (c) Historically, there had existed cooperation between Robin and Farrell as required by the subsidy contracts of these operators, even though no agreement prior to No. 8054 between them had been filed with the Board. In addition, Robin cooperated with the United States/South Africa and South Africa/United States Conference, since Farrell was the only member of these Conferences operating in the trade. In effect, the Conferences were Farrell's tariff-publishing agents.

• • •

[13] (e) Farrell, Robin, and Lykes cooperated with Safmarine in the fixing of rates, and established identical rates adhered to by each. Such cooperation necessarily included Safmarine, for it could not have been successfully accomplished "if one of the leading lines in the trade were to have substantially different rates" (Tr. 191).

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[16] (h) A further difficulty was the problem of reducing to writing with absolute accuracy what appears to have been a rather nebulous understanding between the 5 carriers here discussed (Tr. 669-670).

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[32] (6) Such exchange between respondents did not constitute separate violations of said Section 15, but rather constituted a single, continuing violation.

Opening Brief of Public Counsel of December 21, 1960

(7) While the record does not indicate that respondent Nedlloyd fully participated in the arrangement indicated among the other respondents, it did agree with other carriers at divers times during the period of record as follows:

(a) In October 1955, Nedlloyd agreed through the Secretary of the South Africa/U.S.A. Conference with other lines in the United States/South and East Africa trade, to quote on kapok the same rates quoted by the other lines.

(b) Around September 1956, Nedlloyd agreed with other lines in the United States/South and East Africa trade through the Secretary of the South Africa/U.S.A. Conference to quote a particular rate on paraffin wax in bags.

(c) In November 1957, Nedlloyd agreed with Robin and Farrell that it would charge the same rate on copper as negotiated by the latter carrier.

• • •

[35] The legislative solution to the problems so described was the enactment of Section 15. That section was so drafted as to extend broadly to any agreement between regulated carriers and/or other persons, if such agreement operated to diminish competition, fix prices, or accomplish the various things enumerated in the first paragraph of Section 15. And Congress plainly intended Section 15 to apply to such agreements whether written or oral, formal or informal, detailed or general.

In particular, Section 15 was intended to apply to such informal, oral agreements as are commonly referred to as "gentlemen's agreements". The express words of the section require the filing of a "true copy, or, if oral, a true and complete memorandum, of every agreement," and "agreement" includes "understandings, conferences, and other arrangements." Congress was plainly addressing this enactment to agreements, among others, which are in-

Opening Brief of Public Counsel of December 21, 1960

formal, uncommitted to writing, and general in their outline. The Alexander Committee had earlier expressly called attention to just this kind of agreement:

[36] "Reference should here be made (1) to the tendency toward oral understandings, instead of written agreements, between the lines operating to and from ports of the United States, and (2) the care which has been exercised to prevent agreements and understandings from becoming public. Oral understandings were described by various witnesses as 'safer' than written agreements, and the preceding chapters refer not only to many agreements which were of an oral nature from their inception but to several instances where written agreements were terminated and oral understandings were substituted, the witnesses however admitting that the lines continue to follow the same rates and conditions which were previously observed under the written agreements. In fact, witnesses repeatedly drew the distinction between formal written agreements and oral or 'tacit' understandings.

"While not involving as strong a moral obligation as written agreements, the evidence shows that for all practical purposes oral arrangements are quite as effective. Judging from the manner in which the lines observe the same, the existing oral understandings give unmistakable evidence of the high order of integrity prevailing in modern business, and justify fully the phrase 'gentlemen's agreements.' Written agreements seem to have accomplished their purpose in many trades and are apparently no longer needed. The lines in some instances need not even meet in conference; they may avoid every appearance and every act which would seem to show the existence of an agreement or understanding; and yet op-

Opening Brief of Public Counsel of December 21, 1960

erate in the same spirit of harmony that would prevail if a written agreement existed." Alexander Report, *ibid.*, pp. 293-294).

2. THE BEHAVIOR OF THE RESPONDENTS WAS OF THE TYPE PROHIBITED BY SECTION 15.

It should be admitted at the outset that it would be difficult to define and to prove the exact terms of the agreement that has existed between the respondents during the period of record. This agreement—or more accurately, understanding—[37] was oral rather than written, and therefore somewhat general and uncertain in all its details and workings. Moreover, the understanding existed among five carriers, of whom two served the North Atlantic, one the Gulf, and two both the North Atlantic and Gulf. This geographical diversity of service alone is sufficient to make it unlikely that every carrier participated in full, if at all, in *every* rate discussion between or among the others even though all had agreed to discuss proposed rates or classifications before making a tariff change. It would not seem necessary, however, to show that each carrier participated in all discussions or knew all the actions of the others pursuant to the joint understanding.

. . .

[41] 5. EFFECT OF THE BENEFITS OF THE UNFILED AGREEMENTS.

The record also contains testimony by officials of respondents to the effect that any cooperative arrangement that has existed between the respondents has been beneficial rather than detrimental to the commerce of the United States. These claimed benefits are that subsidized lines have been better able to realize revenues sorely needed for the continuance of their services and eventual replacement of their fleets. Public Counsel neither agree nor disagree

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with this assertion. It is simply irrelevant to the issue at hand. That issue is whether the respondents have violated Section 15 by entering into and carrying out agreements without the required Board approval. Simply irrelevant is the question whether the cooperative arrangements have resulted in unduly high profits, or unreasonably high rates. Violations of Section 15 are not restricted to instances where the effect of an unfiled agreement is detrimental to the commerce of the United States. The section is violated where, as here, a secret unfiled agreement is entered into and carried out.

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Reply Brief of Public Counsel of April 7, 1961

BEFORE THE
FEDERAL MARITIME BOARD
Docket No. 882

UNAPPROVED SECTION 15, AGREEMENTS—VIOLATION OF
SECTION 14, SECOND—SOUTH AFRICAN TRADE

EDWARD APTAKER,
Assistant General Counsel
Division of Regulations

ROBERT B. HOOD, JR.
Public Counsel

Washington 25, D. C.
April 7, 1961

. . .

[2] First of all, this proceeding is not directed toward the issuance of an order by the Board for which enforcement could be sought. This is not a hearing upon a private complaint and therefore no reparations can be ordered by the Board. No one alleges that any current behavior of the respondents is unlawful and therefore there would appear to be nothing for the Board to order ceased and desisted from. The Shipping Act, 1916, does not permit the Board to assess penalties for violations thereof, and therefore there can be no fine or penalty order to be enforced.

All this is not to say, however, that the whole proceeding is nothing more than "moot court." The Board, unlike a court of law, is more than merely a disinterested adjudicator of controversies placed before it by other parties. The Board, like other regulatory agencies, is

Reply Brief of Public Counsel of April 7, 1961

charged with the duty of actively overseeing or supervising a particular industry. In some instances, this supervision results in immediate and sanctioning action by the Board. Examples of such would be cease and desist orders where current and continuing violations are found, or reparations orders where a private, formal complaint has been filed. In other instances this supervision is analogous to that of Congress in considering the advisability of proposed legislation. Proceedings in connection with proposed rules take this form.

• • •

[4] III. WHETHER RESPONDENTS SHOULD BE PENALIZED
SHOULD NOT BE DETERMINATIVE OF WHETHER
SECTION 15 HAS BEEN VIOLATED

The respondents generally argue that in the light of past Board decisions indicating some want of clarity in Section 15 itself, and some lack of clarity in the past construction thereof, it would be improper retroactive adjudication for the Board to find that any behavior brought to light in this record was in violation of the Act. The respondents make a particular point that some past Board decisions indicate that only the carrying out of an unapproved agreement violates Section 15. Assuming the merit of these arguments, this would be no reason for the Board not to find a violation here. While matters such as the respondents raise might be relevant in determining whether and to what extent they should be penalized for their past behavior, these matters do not avoid the Board's responsibility to here speak with force and clarity on the requirements of Section 15. Indeed, unless past ambiguities, if such exist, are cleared in a case such as this or via Board rule, the full meaning of Section 15 will forever remain a problem to the industry and the Board.

• • •

**Hearing Examiner Recommended Decision of
August 3, 1961**

Served
August 3, 1961
Federal Maritime Board

FEDERAL MARITIME BOARD

No. 882

**UNAPPROVED SECTION 15 AGREEMENTS—
SOUTH AFRICAN TRADE**

(1) Respondents found during the period 1954-1959 not to have entered into nor carried out before approval under Section 15 of the Shipping Act, 1916, as amended, any agreements requiring such approval affecting trade between the United States and South and East Africa.

(2) Respondents Farrell Lines Incorporated and Robin Line (Division of Moore-McCormack) found not to have operated vessels during 1957, 1958 and 1959 in the U. S. Atlantic/South and East Africa trade in violation of Section 14, Second, of the Shipping Act, 1916, as amended.

Edwin Longcope and Morton Lifton for respondent Louis Dreyfus Lines.

Elmer C. Maddy and Ronald A. Capone for respondent Farrell Lines Incorporated.

Gerhard A. Gesell, John W. Douglas and Peter S. Craig for respondent Lykes Bros. Steamship Co., Inc.

Burton H. White and Elliott B. Nixon for respondent Nedlloyd Line.

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Albert F. Chrystal, Ira L. Ewers and W. B. Ewers for respondent Robin Line (Division of Moore-McCormack).

Wharton Poor and R. Glen Bauer for respondent South African Marine Corporation, Ltd.

Morton Zuckerman for respondent Baron Iino Line.

Edward Aptaker, Robert B. Hood, Jr. and William J. Smith as Public Counsel.

**RECOMMENDED DECISION OF C. B. GRAY,
EXAMINER**

PROCEEDINGS

On January 7, 1960 the Federal Maritime Board instituted an investigation to determine whether any of the persons named as respondents¹ during the period 1954 through 1958 have carried out before approval under Section 15 of the Shipping Act, 1916, as amended, any agreements affecting trade between the United States and South and East Africa requiring such approval, in violation of the said Section 15.

By amended order of January 15, 1960, the scope of the investigation was broadened to embrace agreements that might have been made and carried out during the period 1954 through 1959 and to determine whether respondents Farrell Lines Incorporated and Robin Line (Division of Moore-McCormack) or either of them have operated vessels during 1957, 1958 or 1959 in the U. S.

¹ Louis Dreyfus Lines—joint service of Louis Dreyfus et cie, and Buries Marques, Ltd., Farrell Lines Incorporated, Lykes Bros. Steamship Co., Inc., Nedlloyd Line—joint service of N. V. Stoomvaart Maatschappij "Nederland" and Koninklijke Rotterdamsche Lloyd, N. V., Robin Line (Division of Moore-McCormack) and South African Marine Corporation Ltd.

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Atlantic-South and East Africa trade in violation of Section 14, Second of the Shipping Act, 1916, as amended.

A prehearing conference was held in Washington on February 10, 1960 at which Public Counsel was directed to furnish certain information requested by respondents. Thereafter Public Counsel obtained subpoenas duces tecum requiring production by respondents at a hearing to be held on May 2, 1960, of specified documents relating to the matters set down for inquiry, and on June 20, 1960 Public Counsel, in compliance with the prehearing ruling, responded to the requests of respondents.

The scope of the investigation was further enlarged by supplemental order of June 27, 1960 to determine whether any of the lines heretofore named as respondents and Baron Iino Line, an additional respondent, entered into and carried out in this trade prior to Board approval agreements fixing or controlling freight rates in violation of Section 15 of the Shipping Act, 1916, as amended, during 1958 and 1959 and continuing through the date of the supplemental order, on (1) liner board, Kraft paper, Kraft wrapping paper and/or wrapping paper; (2) during the year 1959 continuing through the date of the supplemental order on bulk tallow; and (3) during the period last mentioned on wool.

Certain of the respondents excepted to the June 20th responses of Public Counsel to their requests on the ground of incomplete compliance with the Examiner's directive but the responses were accepted and a hearing for the taking of testimony was scheduled to be held on August 2, 1960. The notice of hearing provided that "After the Government's evidence has been introduced and respondents thereby have become fully informed of the matters to be defended the hearing may be recessed for a reasonable period, if it then be deemed necessary, for the preparation of appropriate presentations by respondents." At the close of this hearing Public Counsel was directed

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to furnish respondents further specification of the charges intended to be urged ultimately, and under date of September 6, 1960, there was filed a statement of violations which would be asserted by Public Counsel. Specifically, these were:

1. That some time during the months of December 1954 and January 1955, all of the respondents named in the Board's order of investigation orally agreed with each other that each would increase the freight-rates charged by each for the transportation of goods between ports in the United States and ports in South and East Africa, and further entered into a new agreement or reaffirmed a pre-existing agreement that in the future no respondent would change a freight rate in said trade without first giving some advance notice to the other respondents and discussing said change with other respondents; that a complete memorandum of such agreement was not filed immediately with the Federal Maritime Board as required by section 15 of the Shipping Act, 1916; that the failure to file immediately the terms of this agreement with the Board constituted a violation of Section 15 of the Act; that this violation continued until September 10, 1958¹ at which time Safmarine became a member of Federal Maritime Board Agreement No. 8054; that the said agreement was carried out from time to time during the years 1955-1958 by all of the aforementioned respondents by each conferring with one or more of the others and giving and receiving advance notice of an intent to change a particular rate or rates or commodity classification or classifications; and that such ex-

¹ With the exception of respondent Dreyfus who ceased to operate in the trade in February 1957 and thus was in violation only through that time.

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changes between respondents did not constitute separate violations of said Section 15 but rather are merely evidence of a single, continuing violation.

2. That, in the alternative, respondents Farrell, Lykes, and Robin did enter into an agreement as aforesaid and that such agreement was not immediately filed and was carried out as aforesaid, in violation of Section 15; that if respondents Dreyfus, Safmarine, and Nedlloyd did not enter into an agreement as aforesaid, they each conformed to an agreement of the aforesaid terms for the period aforesaid; that neither Dreyfus nor Safmarine, nor Nedlloyd did immediately file with the Federal Maritime Board a complete memorandum of the agreement to which they were conforming; that such failure to file immediately the terms of such agreement constituted a violation of Section 15 of the Shipping Act, 1916; that this violation continued until September 10, 1958,² at which time Safmarine became a member of Federal Maritime Board Agreement No. 8054; that such conformity is evidenced by the latter three persons mentioned in this paragraph, each conferring from time to time with one or more of the persons mentioned in paragraph one, *supra*, and giving and receiving advance notice of intent to change a particular rate or rates or commodity classification or classifications; and that such exchanges between respondents did not constitute separate violations of said Section 15 but rather are merely evidence of a single, continuing violation.

3. That during the month of June 1959, respondents Lykes, Robin, Farrell, Safmarine and Baron Iino each agreed with the others to establish a rate iden-

² See Note 1, *supra*.

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tical to the rate of the others for the transportation of tallow from the United States to South and East Africa; or in the alternative that respondents Lykes, Robin, Farrell, and Safmarine each agreed with the others to establish a rate identical to the rate of the others for the transportation of tallow from the United States to South and East Africa, and that respondent Baron Iino did during June 1959 commence to conform to such agreement; that the failure of Lykes, Robin, Farrell, Safmarine, and Baron Iino to file immediately with the Board a complete memorandum of such agreement constituted a violation of Section 15 of the Shipping Act, 1916, or that if Baron Iino did not so agree with respondents Lykes, Robin, Farrell, and Safmarine, Baron Iino's failure to file immediately with the Board a copy of the said agreement to which it was conforming constituted a violation of Section 15 of the Shipping Act, 1916; and that such violation continues until the present.

4. That prior to entering into the agreement or understanding indicated in paragraph (1), *supra*, all respondents, excluding Baron Iino, had upon occasion agreed with each other upon rates and practices affecting the trade between the United States and South and East Africa, some of such agreements being as follows:³

A. During the month of August 1954 respondents Farrell, Robin, Lykes and Safmarine agreed to quote the same rate for the transportation of fishmeal in said trade.

³ The sole purpose of Public Counsel's urging the existence of these agreements or understandings is to furnish the Board with some background to the violations alleged in paragraph (1), *supra*.

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B. During the month of August 1954 respondents Farrell, Robin, Nedlloyd, Dreyfus agreed to quote the same rate and conditions for the transportation of lepidolite in said trade.

C. During the month of August 1954 or September 1954 respondent Dreyfus agreed with respondent Robin that each would inform the other of any intended change in rates for the transportation of goods in said trade prior to instituting such a change.

Public Counsel will not urge a finding that respondents Farrell or Robin have violated section 14, Second, of the Shipping Act, 1916. Nor will Public Counsel urge that any of the respondents be found to have violated section 15 of the Shipping Act, 1916, in the fashion indicated by paragraphs numbered (1) and (3) of the Board's Supplemental Order of June 27, 1960.

The hearing was resumed at New York on October 13, 1960 when Public Counsel further examined two of the witnesses who had testified previously; respondents then cross examined all witnesses but offered no direct evidence. Public Counsel tendered 142 exhibits but only 29 of these were received in evidence, the balance being rejected upon objections of respondents. Principally, the objections were that the authors of various communications had not been made available for cross examinations; that intra-company communications were not admissible for the truth of any statements therein with respect to any of the other respondents; that some of the documents contained statements that were contrary to the author's sworn testimony; that others contained obvious and unfounded hearsay; that some exhibits predated the violations specified by Public

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Counsel; that the witness had no first-hand knowledge of the matters mentioned in the exhibits; that the subject matter of the exhibits did not relate to a matter relevant to the asserted violations; that the exhibits refer to an alleged violation which was withdrawn by Public Counsel; that the exhibits relate to an agreement between Farrell Lines and Robin Line, then owned and operated by Seas Shipping Company, not a respondent herein. Proffered evidence of "conformity" was not received, these allegations being beyond the scope of the Board's orders of investigation.

CHRONOLOGY OF THE SOUTH AND EAST AFRICA TRADE
AND ALLEGED AGREEMENT BETWEEN FARRELL, ROBIN,
LYKES, SAFMARINE, DREYFUS, AND NEDLLOYD

In 1919 the United States Shipping Board began experimenting with American flag services in the trade from United States North Atlantic ports to South Africa. It established in 1922 the American South African Line as a regular service under government ownership but with private operators. In 1924 the Shipping Board negotiated two conference agreements with the six foreign flag lines in the trade for maintenance of rates, the U. S. A./South Africa Conference, Agreement No. 3578 (Outbound), and the South Africa/U. S. A. Conference, Agreement No. 3579 (Inbound). Another agreement, No. 3578-A covered spacing and rotation of sailings. All of these agreements were approved pursuant to section 15 of the Shipping Act, 1916. *Seas Shipping Co. v. American South African Line, Inc., et al.*, 1 U. S. S. B. B. 586. In keeping with its policy of divesting itself of government operation, the Shipping Board, in 1925, advertised the American South African Line for sale. As a result of this advertisement the Amer-

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ican South African Line, Inc.⁴ acquired the line and commenced operation of the purchased ships in 1926. *Am. Sou. African Line, Inc.-Subsidy, S. and E. Africa*, 3 U. S. M. C. 277.

On June 22, 1935 the Seas Shipping Company, Inc. (Robin Line)⁵ initiated a new service from New York and other Atlantic ports to South and East Africa, the effect of this new service being to "blanket" the service of the American South African Line. Prior to its entry in the trade Robin Line applied for admission as a member of the conference, with privilege of participation in rate making along with other members and of maintaining 12 sailings per annum, the same number as was maintained by the American South African Line. This application was denied. Subsequently, the lawfulness of that denial was the subject of a formal proceeding before the U. S. Shipping Board Bureau of the Department of Commerce, whose decision of August 1, 1936 upheld the conference action. *Seas Shipping Co. v. American South African Line, Inc., et al., supra*. A rate war, caused in part by Robin Line's entry in the trade, had ended by July, 1937, and rates, except those of Robin Line, were restored to the basis existing prior to the rate war.

Applications for operating differential subsidies under Title VI of the Merchant Marine Act, 1936 had been filed during 1937 by American South African Line, Inc. and Seas Shipping Company, Inc. (Robin Line) for operations to be performed on the same North Atlantic/South and East Africa route. In the course of the proceedings on these applications Robin Line explained in its brief "that while it made contracts for rates during the rate war and was not in position to raise its rates immediately to the conference level, it now offers to meet the conference rates if it receives an operating-differential subsidy." (Original em-

⁴ Predecessor of Farrell Lines Incorporated.

⁵ Predecessor of Moore-McCormack Lines, Inc.

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phasis) *Am. Sou. African Line, Inc.-Subsidy, S. and E. Africa, supra.*

The report of the Maritime Commission further states:

"Pursuant to the provisions of section 211(a) of the Merchant Marine Act, 1936, the Commission has heretofore determined that the route from North Atlantic ports to ports in South and East Africa is an essential trade route of foreign commerce of the United States. Such determination is hereby reaffirmed. Service of the American South African Line, Inc., on this route is not adequate within the purview of section 605(c) of the Merchant Marine Act, 1936, and that line alone cannot provide adequate service on the route by vessels of United States registry. Neither of the applicants here is able alone to provide adequate service by such vessels on this trade route.

We find and determine from the records and evidence in this proceeding that each applicant is eligible and should receive an operating-differential subsidy, upon compliance with the terms and conditions of the Act and the requirements of the Commission.

In reaching this determination, we are not unmindful of the difficulties and problems presented by the existence of two subsidized services in the same trade. For this reason we have concluded that the contracts to be awarded to the applicants should be for an experimental, short-term duration, during which period the applicants, in cooperation with the Commission, should exert every effort to eliminate or solve those difficulties and problems. Specifically, we believe that efforts to effect a merger or consolidation of these companies should be continued; that, failing such a solution, satisfactory arrangements should be worked out covering sailing dates,

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rates, and pooling of homebound cargo, so as to eliminate, as far as possible, competition between the two American companies, and to enable both American companies to cooperate in competing against the foreign lines now carrying the bulk of the commerce in this trade;

• • •

In order to carry the foregoing principles into effect, we have determined as follows:

(1) The application of the American South African Line, Inc., should be, and hereby is, denied to the extent that it requests an exclusive subsidy.

(2) The applications of the Seas Shipping Company, Inc., and the American South African Line, Inc., for operating differential agreements will be granted on the following terms and conditions:

(a) The agreements shall be for a period of six months, with provision for automatic extension for 12 years, at the option of the Commission, upon compliance with all the conditions and agreements.

(b) During said six-month period both companies will be required to exert every reasonable effort to work out or effect a satisfactory consolidation, merger, or other agreement for joint operation over this trade route.

(c) The subsidy agreements will require proper spacing of sailings, maintenance of uniform freight rates, and pooling of homeward cargoes by both operators, all on a basis satisfactory to the Commission."

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Am. Sou. African Line, Inc.-Subsidy, S. and E. Africa, 3 U. S. M. C. 277, 288.

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The subsidy contracts thereafter entered into in 1940 with each of these applicants provided that:

The operator will space the sailings of its vessels and establish, publish, and maintain rates, charges, classifications, tariffs, regulations, and practices on a basis satisfactory to the Commission. The Operator further agrees that if the Commission determines that it is necessary to effect a pooling agreement covering homeward cargoes with any other line or lines using vessels registered in the United States, it will make every effort to effect such agreement and will carry out any such agreement so effected when approved by the Commission.

Lykes Bros. inaugurated service from United States Gulf ports to ports in South and East Africa in January 1941 upon authorization by the Maritime Commission, which required the vessels to return to North Atlantic ports. The authority was on the basis of absolute and complete cooperation with Seas Shipping Company, Inc. (Robin Line) and Farrell Lines Incorporated and of quoting the same rates on certain strategic materials such as ores and wool inbound, as did those companies, in furtherance of the objective of attaining rate uniformity among the American lines in the trade and in view of the fact that there was a shortage of tonnage. Officials of the Maritime Commission also told Lykes that on competitive outbound commodities the rates of Robin Line and of Farrell Lines should be followed. These requirements were imposed because Lykes, who, as a subsidized operator in other services of the Maritime Commission but an unsubsidized line in the South African trade, would be competing indirectly with Robin Line and Farrell Lines, as cargo from the Middle West could move either through the North Atlantic or the Gulf

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ports. Lykes continued in the trade, quoting generally the rates of Robin Line and Farrell Lines until some time in 1942 when its ships were requisitioned by the Government. Continued operation of vessels in the South and East African trade was permitted, subject however, to approval by the Maritime Commission and subject to the rates established by the War Shipping Administration, U. S. Maritime Commission.

In June 1945 Lykes Bros. Steamship Co., Inc., Java Pacific Line and Silver Line, Ltd. associated themselves in a conference (Agreement No. 7780), to be known as the Gulf/South and East African Conference. Article 4 of the Agreement provided that all freight and other charges for or in connection with transportation from United States Gulf ports to South and East African ports should be charged and collected by the parties "strictly in accordance with rates, charges, rules and/or regulations adopted by the parties pursuant to the provisions of this agreement and recorded in the tariff or tariffs of the Conference. All rates, charges, rules and/or regulations and additions thereto and changes herein adopted pursuant to the provisions of this agreement shall be furnished promptly to the governmental agency charged with the administration of section 15 of the Shipping Act, 1916, as amended." Safmarine, also operating in the trade, did not join the Conference but followed conference rates. The War Shipping Administration rates on competitive commodities were the same from both the North Atlantic and from the Gulf ports and notices of changes in such rates were as a common practice mailed to each of the American companies, the Gulf/South and East African Conference, and the Division of Regulations, U. S. Maritime Commission.

Shortly after government control ended in 1946 and operation for their own accounts was resumed representatives of Farrell Lines, Robin Line and Lykes, formerly berth agents for the War Shipping Administration, were

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called to Washington and told by officials of that Administration that while the war was over nevertheless the Government would continue to maintain control over rates. Conformable to official urging each carrier then adopted as its own the War Shipping Administration tariff.

Conflicting views on rate matters arising from time to time between the several American lines were usually reconciled following discussions between the parties. Such matters also occasioned correspondence and personal consultations between officials of the carriers and those of the Maritime Commission, always with emphasis by Commission representatives on the maintenance of a stable rate structure in what is known as a depressed rate trade.

Rates in the Gulf/South and East Africa trade were stabilized from 1946 to 1947 by reason of observance of the War Shipping Administration rates. From 1947 to 1952 stability was maintained by the Gulf Conference lines and by Safmarine coordinating their rates with those of the lines operating out of the North Atlantic ports. Louis Dreyfus Lines entered the trade in 1952 and Mr. Dreyfus, while declining to join the Conference, told Lykes' representative that Conference rates would be followed "as best he could." Thereafter on numerous occasions Lykes urged Dreyfus and its agents to join the Conference, but without success. As a result there was a lack of rate stability in many instances in the period 1952-1954. The Silver Line and Java Pacific Line discontinued services from the Gulf in 1952 and by 1954 the only regular carriers from the Gulf to South and East Africa were Lykes, Safmarine and Dreyfus.

By 1954 the only carriers in the Atlantic/South and East Africa trade were Farrell Lines, Robin Line, Dreyfus, Safmarine and the British South and East Africa Group. Of these, two carriers, Farrell Lines and the British South and East Africa Group, were members of the existing conferences in the trade, namely the U. S. A./South Africa Con-

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ference (Agreement No. 3578) and the South Africa/U. S. A. Conference (Agreement No. 3579). Although frequently invited by Farrell Lines to join the U. S. A./South Africa Conference Safmarine always declined, its policy being not to join either the U. S. Gulf or the U. S. Atlantic/South African Conference or to have any agreement with any other lines. After 1954 Safmarine did not operate as a common carrier on voyages inbound from South Africa to the United States and in 1955 the British South and East Africa Group discontinued service.

Respondent Nedlloyd entered this highly competitive trade in January 1954, operating one sailing a month from United States Pacific Coast ports, vessels in this run loading no cargo at either Gulf or Atlantic Coast ports. The route followed differed from that of the other lines, the Nedlloyd vessels proceeding around Africa from south to north and returning through the Suez Canal to New York and some times to the Gulf. Transit time was about 10 days longer than that of the vessels that sailed from Cape Town directly to the United States. Nedlloyd operated as a non-conference line but its operations did not disturb the trade because of its general policy of following the homeward conference rates and of exchange rate advices with the conference. Approximately ten items in the homeward trade to the Atlantic ports are the only ones of importance to Nedlloyd and at times it has had rates on about half of them that differed from the rates of the other lines. Unless authorized by its principals, the Nederland Line of Amsterdam and the Royal Lloyd of Rotterdam, to do so Nedlloyd is forbidden to enter into any agreements with other carriers. The only exception of record is Agreement No. 8054, mentioned later, for which special authorization to sign was received.

Rates to and from South Africa have always been on a lower basis than rates in comparable long voyage trades. Due to congestion at the various ports in late 1954 revenues

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and earnings of all the carriers had reached minimal levels, a situation causing considerable concern to the Trade Routes Division of the Maritime Commission. Representatives of that Division visited Farrell Lines in New York and discussed in detail the competition between Farrell Lines and Robin Line. Farrell was cautioned "to do better". The same Commission representatives also discussed the South and East African trade with Lykes in New Orleans and expressed their concern about the then current heavy expenses and poor earnings. All lines in the trade were under the disabilities of substantially increased operating costs and all were aware that increased transportation rates were necessary. The prospect of considering an increase in rates was the subject of numerous discussions in late 1954 between representatives of Lykes, Farrell, Robin, Safmarine and Dreyfus. The several lines individually indicated their intentions to increase rates but while understanding that in discussing rates 48 hours notice of a proposed change could or would be given by the proponent to the other lines, the lines were unwilling to reach any firm agreement that this would be done. Ultimately, in December 1954, Lykes, on the basis of its own independent judgment increased its rates by approximately 15 percent, effective March 1, 1955. In furtherance of maintaining uniformity of rates in the trade the other carriers then independently, and with certain individual commodity exceptions, increased their rates by a like percentage. Farrell Lines and Lykes were requested by the Office of Regulations of the Federal Maritime Board in February 1955 for a complete report setting forth the reasons justifying this general increase. These were given, orally, and satisfactorily, to the Chief, Office of Regulations by representatives of Lykes who stressed that expenses had increased, revenues had decreased, and that South African rates were not comparable with rates in other trades. Based on information at hand it was felt

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that competitors of Lykes would also increase their rates. Thereafter, on numerous occasions rate matters were discussed, with the result that in February 1956 the tariff rates of Robin Line, Farrell Lines, Lykes, Dreyfus, Nedlloyd and Safmarine on most items were identical.

Efforts by the President of Farrell Lines to secure the membership of the other lines in the outward and homeward conferences which had been continuous for a number of years were continued after withdrawal of the British lines in 1955. Alternatively, the formation of a new firm conference was suggested. None of the operating lines were willing to bind themselves but Farrell's endeavors to obtain some definite cooperation were not diminished, and on March 27, 1956 an agreement was consummated with Seas Shipping Company. By its terms Farrell Lines and Seas Shipping Company, Inc. (Robin Line) stated their intentions to confer with each other and discuss together from time to time the matter of rates, charges, classifications and related tariff matters appropriate and conformably with law and the interest of the foreign commerce of the United States to be charged or observed by them in the trade with such foreign ports covered by their service; and to agree on various rates, charges, classifications and related tariff matters, to be charged or observed by them, respectively, but with reservation of the right by each of them to alter for itself any rate, charge, classification, or related tariff matter thus agreed upon or theretofore in force upon first giving the other party at least 48 hours advance notice thereof. This was filed with the Federal Maritime Board, and as Agreement No. 8045 was approved under section 15 of the Shipping Act, 1916 on July 2, 1956. (See Appendix "A".)

Discussions between the several lines were held from time to time as conditions warranted and in February 1957 Dreyfus suspended its service in the United States/South and East Africa trade. On or about May 1, 1957 Moore-

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McCormack Lines, Inc. purchased the equipment of Seas Shipping Company, Inc. and the service of the Robin Line under the Moore-McCormack flag was initiated on May 7, 1957. To insure continuance of stability of rates and services of at least the subsidized American flag lines the operating-differential subsidy contract of Moore-McCormack was amended by the addition of the same coordination clause appearing in the 1940 subsidy contracts of Farrell Lines and the Seas Shipping Company, Inc., as set forth at Sheet 8 hereof.

This coordination clause was not fully comparable to the one in Moore-McCormack's subsidy contract for service on Trade Route No. 24, and at the urging of the Chief, Office of Government Aid, was deleted and the following clause substituted therefor, predicated on Moore-McCormack joining the conference:

“To the extent from time to time prescribed by the United States, the Operator shall and it hereby agrees to coordinate the spacing, regularity and frequency of its sailings to and from all points on the subsidized service in conjunction with the operations of any and all other subsidized services on Trade Route No. 15-A. In addition to any other remedies which may be available to the United States, no subsidy shall be payable in respect to any voyage which does not conform to the requirements of the United States for such coordination of the spacing, regularity and frequency of the Operator's sailings, unless the United States determines that such failure to conform was caused by less than 30 days notice of such requirement or by circumstances beyond the Operator's control. The requirement by the United States of such coordination shall constitute its consent thereto for the purpose of the provisions of Article II-18(c) hereof and any other

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provisions of contract or statute requiring such consent."

Although regarding the prior clause as preferable, Farrell Lines accepted this substituted clause for incorporation in its current subsidy contract which became effective January 1, 1958, but only because of the existence of Agreement No. 8054 which contains the rate cooperation clause.

At the time of the sale, Moore-McCormack, responsive to the suggestion of Farrell Lines, indicated its willingness to join the U. S. A./South Africa Conference, Agreement No. 3578, and the South Africa/U. S. A. Conference, Agreement No. 3579, or in the alternative to become signatory to the so-called "48-hour agreement", No. 8054. As the other lines in the trade declined membership in the conferences, Moore-McCormack elected to become a party to Agreement No. 8054 and on August 19, 1957 signed the agreement. Seas Shipping Company terminated its participation in this agreement on September 9, 1957. Thereafter, there was gradual adoption of the agreement by all the carriers, except Baron Iino Line, first by Lykes effective April 3, 1958; then by Nedlloyd effective July 28, 1958, and by South African Marine Corporation, Ltd. effective September 10, 1958.

**ALLEGED AGREEMENT BETWEEN BARON IINO LINE AND
OTHER RESPONDENTS AS TO TALLOW RATE**

Public Counsel's further specification under date of September 6, 1960 of the charges intended to be ultimately urged and the uncontested exclusion of evidence of any respondent "conforming" to agreements resulted in narrowing the charge concerning tallow to the failure to file immediately with the Board a complete memorandum of

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an agreement alleged to have been made during the month of June 1959 by respondents Lykes, Robin, Farrell, Safmarine and Baron Iino Line establishing a rate for the transportation of tallow from United States ports to ports in South and East Africa.

Baron Iino Line entered this trade in January 1959, operating as a non-conference line, at which time the rate on tallow was "open". Baron Iino's tariff filed with the Federal Maritime Board showed that its rate on bulk tallow was "open". Pursuant to the provisions of Agreement No. 8054 the parties agreed in February 1959 that a rate of \$20 per ton should be established for the transportation of tallow in bulk and appropriate tariff amendments were filed with the Federal Maritime Board by Lykes and Nedlloyd on February 29, 1959; by Farrell Lines on March 23, 1959; by Safmarine on June 19, 1959 and by Robin Line on June 29, 1959. Numerous invitations to Baron Iino Line to become a party to Agreement No. 8054 were declined because of the unwillingness of the member lines to grant certain requested concessions. Baron Iino Line had offered a contract rate of \$20 per ton to a receiver of tallow but as this was not accepted the carrier decided on May 27, 1959 to publish a rate somewhat higher. Accordingly it established and published a rate of \$22 per ton to be applicable for a period of six months, from July 1 to December 31, 1959, and filed this tariff change with the Federal Maritime Board on June 26, 1959. Some time in June 1959 an official of the managing agents for Baron Iino Line informed a representative of Safmarine that Baron Iino Line would thereafter quote a rate of \$22 per ton on bulk tallow. Upon learning of this the other lines party to Agreement No. 8054 determined to meet the \$22 rate in order to show the unified position of those lines and amended their tariffs to provide for application of that rate from July 1 through December 31, 1959. Neither the managing agents for Baron Iino Line nor any of the

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other respondents made any promises at any time respecting the rates or terms of carriage on tallow, and as of the time of hearing there was no agreement between Baron Iino Line and any other respondent concerning bulk tallow.

DISCUSSION AND CONCLUSIONS

Public Counsel asks that as to the alleged agreement among Farrell, Robin, Lykes, Safmarine, Dreyfus and Nedlloyd the Examiner conclude (1) that some time during the months of December 1954 and January 1955, Robin, Farrell, Lykes, Safmarine and Dreyfus orally agreed with each other that each would increase its freight rates for the transportation of goods between ports in the United States and ports in South and East Africa; (2) that the same carriers further entered into a new agreement or reaffirmed a pre-existing agreement that in the future none of them would change a freight rate in the said trade without first giving 48 hours notice to the other carriers, and without discussing said change with the carriers; (3) that a complete memorandum of such agreement was not filed immediately with the Federal Maritime Board as required by section 15 of the Shipping Act, 1916, and the failure to file immediately the terms of these agreements with the Board constituted violations of section 15 of the Act; (4) that this violation continued until September 10, 1958 (except as to respondent Dreyfus who ceased to operate in the trade in February 1957, and thus was in violation only through that time) at which time Safmarine became a member of Agreement No. 8054; (5) that the said agreement was carried out from time to time during the years 1955-1958 by all of the aforementioned respondents, in that each conferred with one or more of the others, and gave and received advance notice of intent to change a particular rate or rates or commodity classification or

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classifications; (6) that such exchanges between respondents did not constitute separate violations of said section 15, but rather constituted a single, continuing violation; (7) that while the record does not indicate that respondent Nedlloyd fully participated in the arrangement indicated among the other respondents, it did agree with other carriers at divers times, as follows: (a) In October 1955 Nedlloyd agreed through the Secretary of the South Africa/U. S. A. Conference with other lines in the U. S./South and East Africa trade, to quote on kapok the same rates quoted by the other lines; (b) Around September 1956, Nedlloyd similarly agreed to quote a particular rate on paraffin wax in bags; and (c) in November 1957 Nedlloyd agreed with Robin and Farrell that it would charge the same rate on copper as negotiated by the latter carriers; (8) that complete memoranda of such agreements or understandings were not filed immediately with the Federal Maritime Board as required by section 15 of the Shipping Act, 1916; and (9) that the failure to file immediately the terms of these understandings or agreements with the Board in each instance constituted a violation of section 15 of the Act.

Public Counsel admits that it would be difficult to define and prove the exact terms of the agreement that has existed between the respondents during the period of record because, being oral, it was somewhat general and uncertain in all of its details and workings. Furthermore the diversity of service rendered by two carriers serving North Atlantic ports, one serving Gulf ports and two serving both the North Atlantic and Gulf ports make it unlikely that each of the five carriers respondent participated in full, if at all, in every rate discussion even though all had agreed to discuss proposed rates or classifications before making a tariff change. The position of Public Counsel is that it would not seem necessary to show that each carrier partici-

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pated in all discussions or knew all the actions of the others pursuant to the joint understanding. An additional argument is that the fact that all parties to the understanding may not have kept absolute faith with all others in every instance would not negate the existence of an understanding of the sort embraced by section 15; similarly, the fact that each of the carriers may have had its own, and slightly different, view of what arrangement existed would not remove the behavior from the ambit of section 15.

It is also argued that the Board's approval on July 2, 1956 of agreement No. 8054 between Farrell Lines and Seas Shipping Company did not legalize the behavior of the respondents since that agreement was not complete in that it did not disclose the material fact that there was agreement between all five respondents, not merely between Robin and Farrell. Even if it legalized the relation between the two signatories, it could not serve to legalize the relation between Robin and all the other lines and that between Farrell and all the other lines. Therefore it is said that all five respondents were in violation of section 15 from the inception of their common arrangement until September 10, 1958 when respondent Safmarine became a party.

Maintenance of uniform freight rates in the trade between the United States and South and East Africa by Farrell Lines and Robin Line was in compliance with the respective subsidy contracts rather than by any agreement between these carriers. Adherence to such rates by Lykes, a subsidized operator in other trades, is shown to have been upon specific instructions from the Maritime Commission. In this trade representatives of the several carriers obtained rate information from conversations with each other. These conversations generally, but not always, resulted in the quotation of similar rates but no line was committed to apply any rate schedule until legally obligated by Agreement No. 8054 to do so. Parallel quotations of rates do not prove agreements between the quoting carriers. *Theater*

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Enterprises Inc. v. Paramount Pictures, 346 U. S. 537, 541.
The Federal Maritime Board has recently stated that:

"It is the general practice in the shipping industry for one line to meet exactly the rates of its competitors to the extent they can be ascertained, unless a policy of rate cutting is embarked upon.

• • •

The evidence concerning the quotation of uniform rates by respondents is subject to two inconsistent inferences, i.e., that respondents followed the normal practice of quoting rates to meet exactly those of their competitors, or that respondents agreed among themselves to quote uniform rates. In view of the fact that there are here involved violations of the Act alleged by complainants and that the burden is upon complainants to prove such violations, the inference properly to be drawn is that most favorable to respondents. We conclude that complainants have failed to sustain their burden with respect to this issue." *Cf. Dipson Theatres v. Buffalo Theatres*, 86 Fed. Supp. 716 (1949), cert. den. 342 U. S. 926 (1952). *Oranje Line et al. v. Anchor Line Ltd. et al.*, 5 F. M. B. 714, at 726, 733.

Clearly there is no agreement of which a copy or memorandum must be filed with the Federal Maritime Board for approval where there has been no meeting of the minds of the several respondents, as is virtually conceded by Public Counsel's arguments in support of requested conclusions 1-6, inclusive, which hereby are denied.

The amended coordination clause in the subsidy contracts of Moore-McCormack and of Farrell Lines which was proposed by the Office of Government Aid, Maritime Administration, contains the significant provision that "the requirement by the United States of such coordination shall

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constitute its consent thereto for the purpose of the provisions of Article II-18(c) hereof and any other provisions of contract or statute requiring such consent." Thus, agreements with other subsidized operators for the spacing, regulatory, and frequency of sailings in this trade are required by the Government of the United States, represented by the Federal Maritime Board, to be made as often as the Government may prescribe and the Government's consent thereto is tantamount to approval under section 15 of the Shipping Act, 1916.

Public Counsel's specification of charges to be asserted contained no references to any alleged agreements of Nedlloyd through the Secretary of the South Africa/U. S. A. Conference with the member lines respecting rates on kapok, paraffin wax in bags, and copper. As there is no evidence that Nedlloyd made or carried out any such agreements there is no showing of failure to file such agreements for approval under section 15 of the Shipping Act, 1916, and the request for conclusions 7, 8 and 9 is denied.

With respect to tallow Public Counsel requests conclusions that (1) Farrell, Robin, Lykes, Safmarine and Baron Lino Line agreed among themselves in early 1959 to establish a rate of \$20 per ton, effective May 1, 1959; (2) that these lines agreed no later than June 18, 1959 that each would quote a rate of \$22.00 for the carriage of bulk tallow from United States ports to South and East African ports, to be effective from July 1, 1959 through December 31, 1959; (3) that the terms of these agreements were not immediately filed with the Board; (4) that such failure to file constituted a violation of section 15 of the Shipping Act, 1916, on the part of each of the carriers; and (5) that such violation continued under the terms of the agreement through March 31, 1960. These conclusions cannot be made upon the evidence of record, and the request therefor is denied.

Public Counsel offered no evidence in respect of the alleged violation of section 14, Second, stated in the

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amended order of January 15, 1960, nor of the alleged violations of section 15 with respect to agreements affecting rates on Kraft paper and wool that may have been entered into and carried out by any of the respondents originally named and Baron Iino Line as stated in the Board's supplemental order of June 27, 1960.

Proposed findings and conclusions have been fully considered and except to the extent they are given effect in this report are denied and overruled.

ULTIMATE CONCLUSIONS AND RECOMMENDATIONS

Upon this record it is concluded that none of the respondents has entered into or carried out any agreement as described in the Board's orders of investigation, with the single exception of Agreement No. 8054 which was approved July 2, 1956.

An order should be entered dismissing the charges against respondents Louis Dreyfus Lines—joint service of Louis Dreyfus et cie and Buries Markes, Ltd., Farrell Lines Incorporated, Lykes Bros. Steamship Co., Inc., Nedlloyd Line—joint service of N. V. Stoomvaart Maatschappij "Nederland" and Koninklijke Rotterdamsche Lloyd, N. V., Robin Line (Division of Moore-McCormack), South African Marine Corporation, Ltd., and Baron Iino Line, and discontinuing this investigation.

(Signed) C. B. Gray
C. B. GRAY
Presiding Examiner

USCOMM-MA-DC

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APPENDIX A

FEDERAL MARITIME BOARD

AGREEMENT No. 8054

APPROVED JULY 2, 1956

This Memorandum of Understanding between SEAS SHIPPING COMPANY, INC. and FARRELL LINES INCORPORATED, both being common carriers, operating regularly in the trade between U. S. Atlantic ports and various ports in Southwest, South and East Africa, including the Islands in the Indian Ocean (Reunion, Mauritius, the Comores and Seychelles and Madagascar) and the Islands of Ascension and St. Helena, both out and home, WITNESSETH: That said parties intend, by one or more representatives, to confer with each other and discuss together from time to time the matter of rates, charges, classifications and related tariff matters appropriate and conformably with law and the interest of the foreign commerce of the United States to be charged or observed by them in the trade with such foreign ports covered by their service; and to agree on various rates, charges, classifications and related tariff matters, to be charged or observed by them, respectively, but with reservation of the right by each of them to alter for itself any rate, charge, classification, or related tariff matter thus agreed upon or theretofore in force upon first giving the other party at least forty-eight hours' advance notice thereof.

Copies of all tariffs, supplements thereto and re-issues thereof, recording the rates, charges, classifications and related tariff matters of the parties hereto in the trade covered by this agreement, shall be filed promptly with the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

Any common carrier by water as defined in Section 1 of the Shipping Act, 1916, as amended, who has been regularly

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engaged as such common carrier in the trade between any U. S. ports and the foreign ports covered by this agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain a regular service between such ports, may hereafter become a party to this agreement by agreement of the then parties thereto and by signing this agreement or a counterpart thereof. In no instance shall admission to this agreement be denied an applicant except for just and reasonable cause. Prompt advice of any such denial, together with full statement of the reasons therefor shall be furnished the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended. Every application for admission to this agreement shall be acted upon promptly, and no such admission shall be effective until advice thereof has been sent to the aforementioned governmental agency.

Any party to this agreement may terminate its participation therein by giving 30 days' written notice to each of the other parties. A copy of any such notice shall be dispatched to the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

This Memorandum shall be filed promptly with the Federal Maritime Board for approval, which the undersigned parties hereby join in requesting, under Section 15 of the Shipping Act, 1916, as amended, and shall not be operative prior to such approval.

Dated: New York, N. Y.
March 27, 1956

SEAS SHIPPING COMPANY, INC.
/s/ WINTHROP O. COOK, President

FARRELL LINES INCORPORATED
/s/ JAMES A. FARRELL JR., President

Petition for Review (Docket No. 17,218)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" and KONINKLIJKE ROTTERDAMSCH E LLOYD, N.V. as participants in a joint steamship service under the trade name "NEDLLOYD LINE",

Petitioners,

against

UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION,

Respondents.

The petition of N.V. Stoomvaart Maatschappij "Nederland" and Koninklijke Rotterdamsche Lloyd, N.V., participants in a joint service under the trade name "Nedlloyd Line", respectfully shows as follows:

JURISDICTION AND VENUE

1. This petition is filed, and the jurisdiction of this Honorable Court is invoked, pursuant to Section 4 of the Administrative Orders Review Act, 5 U. S. Code § 1034, to enjoin, set aside and determine to be invalid a final order of the Federal Maritime Commission dated June 19, 1962, a copy of which is annexed hereto as Exhibit A. This order denied petitioners' motion for reconsideration of the Commission's earlier order of April 9, 1962 (Exhibit B annexed), holding that petitioners had violated Section 15 of the Shipping Act, 1916, as amended, 46 U. S. Code § 814.

Petition for Review (Docket No. 17,218)

2. Petitioners are Netherlands corporations participating in a joint common carrier steamship service under the trade name "Nedlloyd Line", pursuant to approved Federal Maritime Commission Agreement No. 7661, between United States ports and ports in South and East Africa. Venue of this proceeding is properly before this Court pursuant to Section 3 of the Administrative Orders Review Act, 5 U. S. Code § 1033.

3. The United States of America is named as a respondent herein pursuant to 5 U. S. Code § 1034. The Federal Maritime Commission is named as a respondent herein pursuant to Rule 38(a) of this Court.

COMMISSION ACTION OF WHICH REVIEW IS SOUGHT

4. On January 7, 1960 the Federal Maritime Board, predecessor agency of the Federal Maritime Commission, commenced an investigation to determine whether petitioners and other steamship carriers in the trade between the United States and South and East Africa had violated Section 15 of the Shipping Act, 1916. A full hearing was held before one of the Board's Trial Examiners, who, on August 3, 1961 issued a recommended decision concluding that none of the carriers had violated Section 15 of the Act. Public Counsel excepted to this decision; petitioners did not.

5. On April 9, 1962, without the benefit of oral argument on the issues presented, the Federal Maritime Commission made a decision and order (Exhibit B annexed) reversing the Examiner and holding that petitioners and all but one of the other steamship carrier respondents in

Petition for Review (Docket No. 17,218)

the agency proceeding had violated Section 15 of the Act between 1954 and 1958 by having made and carried out an unfiled and unapproved cooperative working arrangement for the fixing of transportation rates and related matters. The Board's order referred the matter to the Department of Justice "for appropriate action".

6. On May 8, 1962 petitioners filed with the Federal Maritime Commission a petition and supporting memorandum of law praying for reconsideration of the agency's April 9, 1962 decision, in so far as it related to Nedlloyd Line, and requesting oral argument. This petition was denied in all respects by the Commission's June 19, 1962 order (Exhibit A annexed), review of which is sought by the present petition.

GROUND'S UPON WHICH RELIEF IS SOUGHT

7. (a) The Commission's finding of statutory violation on the part of these petitioners was not supported by reliable, probative or substantial evidence.

(b) The Commission's finding of statutory violation on the part of these petitioners was contrary to the reliable, probative and substantial evidence.

(c) The Commission failed to accord due weight to the findings of the Hearing Examiner who heard and saw the witnesses.

(d) The Commission erred in finding an agreement under Section 15 of the Shipping Act, 1916, merely because two or more lines happened to be of common mind on a particular subject.

(e) The Commission erred in holding these petitioners responsible for arrangements claimed to have been made

Petition for Review (Docket No. 17,218)

by their agents or representatives, even though these agents and representatives were not authorized to make any such arrangements and had been specifically directed not to do so.

(f) The Commission misinterpreted Section 15 of the Shipping Act, 1916 in holding that the mere making of an agreement, without any effectuation thereof, was a violation of that Act.

(g) The Commission erred in characterizing the proceeding before it as nothing more than an "administrative inquiry * * * to regulate present or future conduct through appropriate orders or rules". No such rules or orders of future applicability were ever issued.

(h) The Commission erred in holding that the present petitioners, respondents in the proceeding before it, were not entitled to receive, prior to the hearing, specifications of factual matters relating to the violations asserted.

(i) The Commission erred in reversing the Hearing Examiner and in accepting evidence properly rejected by him as being hearsay, incompetent, irrelevant and immaterial.

(j) The Commission erred in holding that it had no jurisdiction to consider matters in extenuation or mitigation—a position wholly inconsistent with the doctrine of primary agency jurisdiction.

THE RELIEF PRAYED FOR

8. Petitioners pray that the June 19, 1962 order of the Federal Maritime Commission, and the April 9, 1962 order which it affirmed, be annulled, vacated and set aside, in so far as the same relate to these petitioners, and that petition-

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ers may have such other and further relief as to this Honorable Court may seem just and proper.

Dated: New York, New York,
August 14, 1962.

BURLINGHAM UNDERWOOD BARBON
WRIGHT & WHITE,
BURTON H. WHITE,
ELLIOTT B. NIXON,
26 Broadway,
New York 4, New York,
and

ARTHUR E. TARANTINO,
430 Washington Building,
Washington 5, D. C.,
Attorneys for Petitioners.

Petition for Review (Docket No. 17,222)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTH AFRICAN MARINE CORPORATION LTD.,
Petitioner,
against

UNITED STATES OF AMERICA and FEDERAL MARITIME
COMMISSION,
Respondents.

The petition of South African Marine Corporation Ltd. respectfully shows as follows:

JURISDICTION AND VENUE

1. This petition is filed, and the jurisdiction of this Honorable Court is invoked, pursuant to Section 4 of the Administrative Orders Review Act, 5 U. S. Code § 1034, to enjoin, set aside and determine to be invalid a final order of the Federal Maritime Commission dated June 19, 1962, annexed hereto as Exhibit A. This order denied petitioner's motion for reconsideration of the Commission's earlier order of April 9, 1962 (Ex. B annexed), holding that petitioner had violated Section 15 of the Shipping Act, 1916, as amended, 46 U. S. Code, § 814.

2. Petitioner is a corporation organized and existing under the laws of the Union of South Africa which operates a common carrier steamship service from United States ports to ports in South and East Africa. Venue of this proceeding is properly before this Court pursuant to

Petition for Review (Docket No. 17,222)

Section 3 of the Administrative Orders Act, 5 U. S. Code § 1033.

3. The United States of America is named as a respondent herein pursuant to 5 U. S. Code § 1034. The Federal Maritime Commission is named as a respondent herein pursuant to Rule 38 (a) of this Court.

COMMISSION ACTION OF WHICH REVIEW IS SOUGHT

4. On January 7, 1960, the Federal Maritime Board, predecessor agency of the Federal Maritime Commission, commenced an investigation to determine whether petitioner and other steamship carriers in the trade between the United States and South and East Africa had violated Section 15 of the Shipping Act, 1916. Lengthy hearings were held before one of the Board's Trial Examiners, who, on August 3, 1960, issued a recommended decision concluding that none of the respondents had violated Section 15 of the Act. Public Counsel excepted to this decision; petitioner did not.

5. On April 9, 1962, without the benefit of oral argument on the issues presented, the Federal Maritime Commission made a decision and order (Ex. B annexed) reversing the Examiner and holding that petitioner and all but one of the other steamship carrier respondents in the agency proceeding had violated Section 15 of the Act between 1954 and 1958 by having made and carried out an unfiled and unapproved cooperative working arrangement for the fixing of transportation rates and related matters. The Board's order referred the matter to the Department of Justice "for appropriate action."

6. On May 8, 1962, petitioner filed with the Federal Maritime Commission a petition and supporting memoran-

Petition for Review (Docket No. 17,222)

dum of law praying for reconsideration of the agency's April 9, 1962 decision, in so far as it related to South African Marine Corporation Ltd. This petition was denied in all respects by the Commission's June 19, 1962 order, review of which is sought by the present petition.

GROUND UPON WHICH RELIEF IS SOUGHT

7. (a) The Commission's finding of statutory violation on the part of this petitioner was not supported by reliable, probative or substantial evidence.

(b) The Commission's finding of statutory violation on the part of this petitioner was contrary to the reliable, probative and substantial evidence.

(c) The Commission failed to accord due weight to the finding of the Hearing Examiner who heard and saw the witnesses.

(d) The Commission found that the record was "largely built of highly incriminating evidence from the files of each respondent (except Baron Iino)" and disregarded the fact that no "incriminating evidence" was in the files of South African Marine Corporation Ltd.

(e) The Commission erred in finding an agreement under Section 15 of the Shipping Act, 1916, merely because two or more Lines happened to be of common mind on a particular subject.

(f) The Commission erred in holding this petitioner responsible for arrangements claimed to have been made by its agents or representatives, even though these agents and representatives were not authorized to make any such arrangements.

(g) The Commission improperly construed Section 15 of the Shipping Act, 1916, as subjecting a carrier to a pen-

Petition for Review (Docket No. 17,222)

alty of \$1,000 per day for the mere making of an agreement even although the agreement was never carried out.

(h) The Commission erred in characterizing the proceeding before it as nothing more than an "administrative inquiry . . . to regulate present or future conduct through appropriate orders or rules." No such rules or orders of future applicability were ever issued.

(i) The Commission erred in reversing the Hearing Examiner and in accepting evidence properly rejected by him as being hearsay, incompetent, irrelevant and immaterial.

(j) The Commission erred in holding that it had no jurisdiction to consider matters in extenuation or mitigation—a position wholly inconsistent with the doctrine of primary agency jurisdiction.

THE RELIEF PRAYED FOR

8. Petitioner prays that the June 19, 1962 order of the Federal Maritime Commission, and the April 9, 1962 order which it affirmed, be annulled, vacated and set aside, in so far as the same relates to this petitioner, and that petitioner may have such other and further relief as to this Honorable Court may seem just and proper.

Dated: New York, N. Y., August 14, 1962.

HAIGHT, GARDNER, POOR & HAVENS
80 Broad Street
New York 4, N. Y.
WHARTON POOR
R. GLENN BAUER
and
HOGAN & HARTSON
Colorado Building
Washington 5, D. C.
RUSSELL B. PACE, JR.

Petition for Review (Docket No. 17,224)
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FARRELL LINES INCORPORATED,
against
FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Petitioner,
Respondents.

This is a petition of Farrell Lines Incorporated to review a final order of the Federal Maritime Commission (the "Commission"), successor of the Federal Maritime Board (the "Board"), entered under the Shipping Act, 1916, 46 USC 801, et seq., and served on April 10, 1962 in *Unapproved Section 15 Agreements—South African Trade*, in FMC Docket No. 882 and the Commission's order served June 19, 1962 denying petitioner's petition for reopening and reconsideration of said order served on April 10, 1962. A copy of the Commission's report and order served April 10, 1962 is attached hereto and marked Exhibit A. A copy of the Commission's order served June 19, 1962 is attached hereto and Marked Exhibit B.

JURISDICTION AND VENUE

This Court has jurisdiction to review orders of the Commission pursuant to 5 U. S. C. Sec. 1032. Venue is in this Court under 5 U. S. C. Sec. 1033.

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NATURE OF THE PROCEEDINGS

Petitioner, Farrell Lines Incorporated, is a United States flag steamship company, Petitioner and Moore-McCormack Lines, Inc. (Robin Line Division), Lykes Bros. Steamship Co., Inc., South African Marine Corporation, Ltd., Nedlloyd Line and Louis Dreyfus Line (the "Companies") were engaged in the trade between ports on the United States Atlantic and Gulf Coasts and South and East Africa (the "Trade"). Petitioner and Robin Line pursuant to Sec. 15, Shipping Act, as amended (the "Act"), entered into Agreement No. 8054, which was approved by the Federal Maritime Board on July 2, 1956 and thereafter the other above-named Companies, except Louis Dreyfus Lines which discontinued service in the Trade in February, 1957, joined such Agreement with the approval of the Board between July 2, 1956 and September 10, 1958.

On January 7, 1960, the Board initiated an investigation to determine whether any of the Companies, including petitioner, during the period 1954 through 1958 carried out before approval under Section 15 of the Act any agreements, requiring such approval, affecting trade between the United States and South and East Africa.¹

Hearings were held before Examiner C. B. Gray who thereafter issued a Recommended Decision served August

¹ By the Board's amended order dated January 15, 1960, such investigation was broadened to determine whether petitioner and Robin Line in 1957, 1958 or 1959 used vessels in the Trade in violation of Section 14 of the Act. By the Board's supplemental order dated January 27, 1960, the scope of the investigation was further broadened to determine whether any of the Companies, including petitioner, carried out before approval under said Section 15 of the Act any agreements fixing or controlling freight rates requiring such approval with Baron Iino Line with respect to certain products. The Commission found that the Companies, including petitioner, had not violated the Act in such respects and therefore this petition does not seek review with respect thereto.

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3, 1961 in which he concluded that the Companies, including petitioner, had not entered into nor carried out before approval under Section 15 any agreements requiring such approval during the period 1954-1958.

By report and order served April 10, 1962, the Commission ordered that this proceeding be discontinued and referred the alleged violations of Section 15 to the Department of Justice after overruling the Examiner's Recommended Decision that no Section 15 violations had occurred.

Petitioner is aggrieved by the Commission's action and seeks to have the order and report served April 10, 1962, and its order served June 19, 1962 concerning the alleged violations of Section 15 of the Act set aside and annulled.

GROUND ON WHICH RELIEF IS SOUGHT

The Commission by its orders, report and related actions, has committed errors of fact and law (procedural and substantive), and has acted arbitrarily and capriciously in at least the following significant respects:

(1) The Commission's findings are based on evidence which is not reliable, probative, or substantial, are contrary to the evidence of record, are contrary to law and are not supported by the evidence of record.

(2) The Commission has unlawfully and arbitrarily derived its findings by:

a. Relying upon uncorroborated hearsay evidence;

b. Misinterpreting the evidence of record and making unlawful and untenable inferences therefrom;

c. Ignoring evidence clearly refuting the existence of illegal action by the Companies and petitioner; and

Petition for Review (Docket No. 17,224)

d. Unlawfully imposing upon petitioner and the Companies the burden of proof.

(3) The Commission erred in failing:

a. To accord due weight to the findings of the Hearing Examiner who saw and heard the witnesses; and

b. To confirm the Examiner's exclusion of hearsay and otherwise objectionable evidence.

(4) The Commission erred:

a. In finding that this proceeding is merely an administrative inquiry instituted to regulate present or future conduct through the issuance of appropriate order or rules;

b. In finding that the Companies, including petitioner, were charged with nothing; and

c. In failing to find that this proceeding is quasi penal in nature.

(5) The Commission erred in holding unwarranted the Examiner's requirement that Public Counsel furnish a particularization of the charges intended to be urged and that such requirement (a) caused Public Counsel to amend the Board's order, (b) circumscribed Public Counsel in his investigation, (c) put Public Counsel on trial and (d) interfered with the performance of his duty to develop the evidence.

(6) The Commission erred:

a. In finding that the Companies, including petitioner, entered a cooperative working arrangement and numerous subsidiary rate agreements and un-

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derstandings contrary to Section 15 of the Shipping Act;

b. In holding that the Companies, including petitioner, failed to file said alleged arrangement, agreements and understandings immediately with the Board contrary to Section 15 of said Act;

c. In holding that Agreement No. 8054 was not a true and complete copy of the memorandum of the arrangement set forth therein contrary to Section 15 of said Act;

d. In holding that said arrangement, agreements and understandings were carried out by the Companies, including petitioner, during the years 1954-1958 contrary to Section 15 of said Act;

e. In holding that the Companies, including petitioner, were in violation of Section 15 of said Act from 1954 until September 10, 1958;

f. In holding that mere failure immediately to file agreements with the Commission is a violation of Section 15 of said Act;

g. In failing to hold that only the carrying out of unapproved agreements is a violation of Section 15 of said Act;

h. In failing to confirm the Examiner's holding that the activities of petitioner had been directed or sanctioned by the former Maritime Commission, the Board or their representatives; and

i. In referring the alleged violation of Section 15 to the Department of Justice.

Petition for Review (Docket No. 17,224)

THE RELIEF PRAYED

Petitioner prays that this Court:

(1) Hold that there is no basis in law or fact on which the Commission can find that petitioner engaged in the alleged activities in violation of Section 15 of the Act, and to that extent set aside the Commission's order and report served April 10, 1962;

(2) Order the Commission not to refer the facts and findings in said order and report to the Department of Justice, or, if the Commission has already done so to withdraw such reference;

(3) Grant such other and further relief as the Court may deem proper.

August 14, 1962

Respectfully submitted,

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New York 5, N. Y.

and

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Washington 4, D. C.
Attorneys for Petitioner

Of Counsel:

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**Memorandum on Behalf of Petitioners in Opposition
to Motion to Dismiss of November 14, 1962**

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

[SAME TITLES]

Government counsel have moved to dismiss the review petitions on the ground that the Federal Maritime Commission's April 9 and June 19, 1962, orders do not constitute "final" orders which this Court has jurisdiction to review under the Hobbs Act (5 U. S. C. 1032c). Respondents do not contend (as indeed they scarcely could) that the Commission's orders are not "final" in the purely procedural sense; plainly there is no further function for the agency to perform and the administrative process has been "exhausted". Rather they assert that petitioners can in no way have been prejudiced, because the April 9, 1962 order merely discontinued the Commission's investigation and referred the matter to the Department of Justice for collection of statutory penalties.

This Court has made it clear that "What is decisive is not the form of the order but rather the realities of the situation which the order creates (or continues) for the complainant." *California Oregon Power Co. v. Federal Power Commission*, 99 U. S. App. D. C. 263, 239 F. 2d 426, 432 (1956). So that these "realities" may be understood in the context of this case, we shall first refer briefly to the regulatory statute and then to the administrative proceeding conducted by the Commission.

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THE STATUTE

The Shipping Act, 1916, gives the regulatory agency exclusive jurisdiction to pass upon the legality of shipping practices adopted by common carriers by water. *U. S. Navigation Co., Inc. v. Cunard S. S. Co.*, 284 U. S. 474 (1932); *Far East Conference v. United States*, 342 U. S. 570 (1952); *American Union Transport v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (1954), aff'd 222 F. 2d 369. Section 22 (46 U. S. C. 821) authorizes the Commission "upon its own motion" to investigate any violation of the Act. Section 23 (46 U. S. C. 822) provides that "Orders of the Commission relating to any violation of this Act shall be made only after full hearing * * *." Under Section 24 (46 U. S. C. 823) the Commission is required to "enter of record a written report of every investigation made under this Act in which a hearing has been held, stating its conclusions, decision, and order * * *."

THE AGENCY PROCEEDING

On January 7, 1960, pursuant to these statutory powers, the Commission's predecessor, the Federal Maritime Board, instituted an investigation (Docket 882) to determine whether petitioners and the other carriers named as respondents had violated Section 15 of the Shipping Act (46 U. S. C. 814) by carrying out unfilled and unapproved anti-competitive agreements. As in all previous investigations of this character, formal hearings were held before a hearing examiner. The Board's own counsel ("Public Counsel") presented the Board's case, and each of the present petitioners was also represented by counsel. Numerous witnesses testified, and a record of more than 1,000 pages was developed. Throughout it was recognized by all parties that the Commission was engaged in a quasi-

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judicial proceeding to determine whether or not the carriers, or any of them, had engaged in past conduct violative of Section 15 of the Act (46 U. S. C. 814) and that the provisions of Sections 5-8 incl. (5 U. S. C. 1004-1007) of the Administrative Procedure Act were fully applicable.

The hearing examiner filed a recommended decision in which he concluded that no violations of Section 15 on the part of the carriers had been established. Public Counsel excepted to the examiner's findings. On April 9, 1962, the Commission handed down an order (a copy of which is annexed to the review petitions herein) in which it rejected the examiner's findings and conclusions, held that six of the carriers had in fact violated Section 15 of the Act and referred the matter to the Department of Justice for collection of penalties provided for in the Section's final sentence.

Since the Commission found that the petitioners were not currently violating the Act and since it considered that no further agency action was required, the Commission's order also provided for discontinuance of the proceeding.

Following denial of their motions for reconsideration of the Commission's April 9 order, petitioners filed petitions in this Court for review of the Commission's action.

Although the fact is nowhere mentioned in respondents' September 26, 1962 motion to dismiss, six days *before* that motion was served a civil action was instituted in the name of the United States in the United States District Court for the Southern District of New York, alleging that petitioners had violated Section 15 of the Shipping Act and seeking recovery of the statutory penalties. A copy of that complaint is annexed hereto as Appendix A.

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THE COMMISSION'S ORDER IS REVIEWABLE

It is against the background of these "realities" that the merits of respondents' arguments must be assessed. Government counsel's memorandum asserts blandly that "no legal relationship has been fixed as a consummation of the administrative process" (p. 5). Yet the "reality" of the situation is that petitioners now find themselves branded as violators of Section 15 and summoned as defendants in a pending court action to recover a \$1,000 per day penalty. Neither of these consequences could have occurred except as a direct result of the Federal Maritime Commission's order, since (as above noted) this is an area in which the agency exercises an exclusive primary jurisdiction. Under the circumstances, it is indeed a strange perversion of language to state that petitioners are not "aggrieved" and that "nothing at all is happening" to them (Respondents' memorandum, p. 6).

The gist of respondents' argument (memorandum, pp. 4-5) is that the Commission's order is not reviewable, because any penalties against petitioners will result from the alleged violation of the statute rather than from the administrative order itself. This reasoning was in fact the basis of the Supreme Court's decision in *Lehigh Valley R. Co. v. United States*, 243 U. S. 412 (1916), holding unreviewable an administrative determination by the Interstate Commerce Commission relating to a rail carrier's status under the Panama Canal Act. However, the epitaph of this and other "negative order" decisions, stemming from *Proctor & Gamble Co. v. United States*, 225 U. S. 282 (1912), was written in *Rochester Telephone Co. v. United States*, 307 U. S. 125 (1938). The Supreme Court there said (per Frankfurter, J.):

"While the penalties may be imposed by the statute for its violation and not for disobedience

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of the Commission's order, a favorable order would render the provisions of the statute inoperative. The complainant can come into court, of course, not to review action within the discretionary authority of the Commission to render an adverse rather than a favorable decision, but because he urges errors of law outside of the Commission's final say-so." (pp. 133-134)

As a result of the *Rochester* decision there has been clearly established what Davis refers to as "the important proposition that an administrative determination may be ripe for review though it neither commands nor prohibits but merely declares." 3 *Administrative Law Treatise*, 169 (citing cases).

In *Columbia Broadcasting System v. U. S.*, 316 U. S. 407 (1942) the order under review as a regulation issued by the Federal Communications Commission to the effect that the license of a broadcasting station would not be renewed if the station had entered into certain network contracts then common to the industry. The Commission further provided that a license would be temporarily extended pending judicial review if any station wished to challenge the legality of the order. The Court rejected (pp. 417-18) the Commission's contention that its regulation was not an "order" within the meaning of the applicable review act:

" * * * The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is re-

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viewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for noncompliance. *Assigned Car Cases, supra* (274 U. S. 564); *A. T. & T Co. v. United States, supra* (299 U. S. 232)."

The *Columbia Broadcasting* case was concerned with a regulation issued under the agency's rule-making powers. The reasons for obtaining review, however, are even stronger where, as here, the order is not an exercise of a rule-making power but is directed to named individuals. In the present case it is the petitioners alone who have been found to have violated the Shipping Act. With recent institution of the Government's civil action to recover penalties the Commission's findings have already borne fruit to the respondents' detriment, and the need for review is imperative.

In *Powell v. United States*, 300 U. S. 276 (1937) the Interstate Commerce Commission issued an order, after a full hearing on a complaint brought before it, that a tariff which included Fort Benning, Georgia, filed by the Seaboard Air Line Ry. Co. be "stricken from the files." Before the Supreme Court it was argued that the order was not reviewable because it required no one to do or refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance "except as a record of a certain completed act performed by the Commission." In rejecting that argument and holding the order reviewable, the Supreme Court stated at page 285:

"But overemphasis upon the mere form of the order may not be permitted to obscure its purpose

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and effect. By it the commission meant to put an end to the tariff in question and the service of the Seaboard according to its terms. * * * In effect the order grants the relief sought by the Central's complaint; it confines the Seaboard's service within the junction switching limits, denies leave to that carrier to furnish, and prevents it from furnishing, transportation to and from Fort Benning. Interpreted according to its purpose, the order is in substance and effect an affirmative one and therefore reviewable under the statute. *Chicago Junction Case*, 264 U. S. 258, 263. *Intermountain Rate Cases*, 234 U. S. 476, 490. *United States v. New River Co.*, 265 U. S. 533, 539-541. *Alton R. Co. v. United States*, 287 U. S. 229, 237 * * *."

See also: *B. F. Goodrich Co. v. Federal Trade Commission*, 93 U. S. App. D. C. 50, 208 F. 2d 829 (1953); *Amshoff v. U. S.*, 228 F. 2d 261 (1955); *Phillips Petroleum Co. v. Federal Power Commission*, 227 F. 2d 470, 474 (1955).

In the present case the Federal Maritime Commission's declaration that petitioners violated Section 15 of the Shipping Act has unleashed a chain of consequences which are neither remote nor speculative. As petitioners intend to demonstrate in their argument on the merits, this determination was arrived at in the course of a proceeding which flouted the commandments of the Administrative Procedure Act and announced a novel interpretation of the statute wholly at variance with a long history of previous construction. The Commission's order is certain to have important effects, not only upon these petitioners but upon the whole steamship industry. The claimed errors of fact and of law should be passed upon by this Court now.

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It is unnecessary to discuss in detail each of the decisions cited in the respondent's memorandum; they broadly recognize the principles referred to here but are distinguishable on the basis of the different statutes involved and the different factual situations. None of them concerns a formal administrative adjudicatory proceeding resulting in a declaration that the basic regulatory statute had been violated. In none were the consequences of that determination translated into such immediate and prejudicial reality as here.

This Court is surely aware that within the past nine months it has taken jurisdiction to review at least two Federal Maritime Commission orders in which violations of the Shipping Act were declared and the administrative proceeding discontinued upon referral of the matters to the Department of Justice. *Anchor Line, Ltd. et al. v. Federal Maritime Commission*, — U. S. App. D. C. —, 299 F. 2d 124 (1962). *Royal Netherlands S. S. Co. v. Federal Maritime Board*, — U. S. App. D. C. —, 304 F. 2d 938 (1962). In neither instance did Government counsel seek to uphold the Commission's determination on the theory, now advanced here for the first time, that this Court was without jurisdiction under the Judicial Review Act of 1950 to pass upon the agency's order. Nor did the Court itself evidence any doubts on the subject; otherwise it would surely have dismissed the review petitions *sua sponte* for so grievous a jurisdictional defect.

Finally, it may not be out of order to suggest that rather too much significance is attributed to the word "final" in Section 2(c) of the Judicial Review Act of 1950 (5 U. S. C. 1032(c)). Prior to the enactment of that legislation orders of the Federal Maritime Commission's predecessor agencies were reviewable under the Urgent Deficiencies Act 1913 (28 U. S. 2321, formerly 28 U. S. C., 1940 ed. § 44) in accordance with Section 31 of the Shipping Act (46

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U. S. C. 830), which referred to "suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission * * *." Neither Section 31 nor the Urgent Deficiencies Act contains any reference to a "final" order. Section 10(c) of the Administrative Procedure Act (5 U. S. C. 1009c) does use the term, but this language was merely intended to embody judge-made law as to reviewability.* Nothing in the legislative history of the 1950 Judicial Review Act indicates any intention to affect any substantive change in the character or type of orders made subject to review in the Courts of Appeals. The whole purpose of the Act was procedural—to avoid the convening of special three-judge courts and to abolish direct appeals to the Supreme Court in cases which were frequently of little public importance. See 1950 U. S. Code Congr. Service, p. 4303.

CONCLUSION

In *Isbrandtsen v. United States*, 93 U. S. App. D. C. 293, 211 F. 2d 51, 55 (1954) cited by respondents, this Court said: "Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action." The court there emphasized the "grave consequences" to the petitioner from allowing a dual rate system to go into effect pending an agency hearing. Certainly, the consequences of completed agency action are fully as

* See statement of the Attorney General with respect to Section 10(c): "This subsection, * * * is intended to state existing law * * *". Sen. Doc. No. 248 at p. 230, 79th Cong., 2d Sess. 369 (1946), quoted in 3 *Davis Administrative Law Treatise*, p. 101, where the cases are reviewed and the statement is approved.

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serious to the petitioners here and no less deserving of
this Court's consideration.

THE MOTION TO DISMISS SHOULD BE DENIED
Oral Argument is Requested.

Respectfully submitted,

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November 14, 1962.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civ. 3208

UNITED STATES OF AMERICA,

Plaintiff,

*against*MOORE-McCORMACK LINES, INC., NEDLLOYD LINE, SOUTH
AFRICAN MARINE CORP., LTD., LYKES BROS. STEAMSHIP CO.
and FARRELL LINES, INCORPORATED,Defendants.

Plaintiff, by Vincent L. Broderick, United States Attorney, complaining of the defendants, alleges upon information and belief:

FIRST: This action arises under the provisions of Section 15 of the Shipping Act, 1916, as amended, 39 Stat. 733, 46 U. S. C. § 814, as hereinafter more fully appears.

Second: At all of the times hereinafter mentioned, plaintiff was and still is a sovereign corporation.

Third: At all of the times hereinafter mentioned, the defendants were and still are either domestic or foreign corporations with offices for the transaction of business, and are regularly engaged in doing business, within the Borough of Manhattan, City and State of New York, within this District and within the jurisdiction of this Honorable Court.

Fourth: This action is brought upon the direction of the Attorney General of the United States upon information furnished by the Federal Maritime Commission, formerly known as the Federal Maritime Board, its predecessor.

Appendix A

Fifth: The defendants are common carriers by water in the foreign commerce of the United States, operating between ports in the United States and ports in South and East Africa.

Sixth: Heretofore, and between the years 1954 and 1958, inclusive, the defendants, acting in concert, engaged in a cooperative working arrangement for the exchange of information relating to freight rates and related matters and for the fixing of rates, which was participated in by all of the defendants and resulted in the establishment of identical rates adhered to by each of them in the United States/South and East Africa trade.

Seventh: During the years 1954 through 1958, a cooperative working arrangement between the defendants was used to reach agreement on the rate levels for specified commodities and groups of commodities and from time to time on general rate increases, and resulted in their tariff rates being identical on most items by early 1956.

Eighth: Heretofore and between the years 1954 and 1958, inclusive, the defendants, acting in concert, engaged in a cooperative working arrangement whereby each agreed that no one of the defendants would change a freight rate in the United States/South and East Africa trade without first giving some advance notice to the other defendants and discussing said change with the other defendants.

Ninth: At all of the times hereinafter mentioned, defendants engaged in, participated in, and carried out the agreements and understandings reached under their cooperative working arrangement for fixing freight rates and other related matters without having filed any prior memorandum or writing with the Federal Maritime Board, nor received any approval of such working arrangement from the Federal Maritime Board.

Appendix A

Tenth: On or about March 27, 1956, the defendants Farrell Lines, Incorporated and Seas Shipping Co., Inc. (Subsidiary of Moore-McCormack) entered into a written agreement between themselves disclosing an understanding between them to confer, discuss and agree with each other from time to time on matters of freight rates, charges, classifications and related tariff matters on the trade they engaged in between the United States Atlantic Ports and various ports in Southwest and Southeast Africa. This agreement was filed with the Federal Maritime Board and approved on July 2, 1956, in the form presented by the two defendants Farrell Lines, Incorporated and Seas Shipping Co., Inc. (Subsidiary of Moore-McCormack) the sole signatories thereto.

Eleventh: At all of the times hereinafter mentioned the sole written agreement which was filed with the Federal Maritime Board designated number 8054, was not a true and complete copy or memorandum of the arrangement outlined therein as hereinabove referred to, in that it failed to disclose all of the parties thereto and did not fully reveal the remaining parties, also defendants herein, until September 10, 1958, contrary to Section 15, so that agreement number 8054 was unlawful.

Twelfth: On or about May 1, 1957, the defendant Moore-McCormack Lines, Inc. purchased the Seas Shipping Co., Inc. and placed its equipment under the Moore-McCormack flag on or about May 7, 1957, and Seas Shipping Co., Inc. was made a subsidiary of Moore-McCormack Lines, Inc.

Thirteenth: All of the defendants are and were at all times pertaining, persons subject to the Shipping Act of September 7, 1916, c. 451, § 15, 39 Stat. 733, as amended, 46 U. S. C. § 814.

Fourteenth: The aforesaid cooperative working arrangement or any of the numerous subsidiary rate agreements

Appendix A

and understandings as aforesaid were for the purpose of fixing or regulating transportation rates and providing for special privileges and advantages of an exclusive, preferential and cooperative nature between persons subject to the Shipping Act, 1916, and are therefore subject to Section 15, 46 U. S. C. § 814, which Section requires all such agreements to be filed with the Federal Maritime Board immediately upon being made and forbids their being carried out prior to approval or after disapproval by said Board.

Fifteenth: In failing to file said preferential arrangements and agreements and in carrying out the said arrangements and agreements before filing them with the Federal Maritime Board and receiving the approval of the Board, the defendants and each of them, violated the Shipping Act, 1916, as aforesaid, and became and are subject to liability, jointly and severally, to plaintiff for penalties of \$1,000.00 for each day of violation committed by each defendant, as therein provided.

WHEREFORE, plaintiff demands judgment against the defendants and each of them for such amount as the Court shall determine, as provided by law, besides the costs and disbursements of this action.

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Court of Appeals Order of December 17, 1962

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,218

September Term, 1962

[SAME TITLES]

Before:

PRETTYMAN, Senior Circuit Judge, and

WILBUR K. MILLER, Circuit Judge, and

**BELL, Circuit Judge of the Fourth Circuit, sitting by
designation.**

These cases came on for hearing on respondents' motion to dismiss, and the motion was argued by counsel, upon consideration whereof, it is

ORDERED by the court that the motion to dismiss is hereby denied, without prejudice to renewal at the time of hearing on the merits, and it is

FURTHER ORDERED by the court that the above-entitled cases are hereby consolidated for the purposes of filing briefs, joint appendix and for hearing, and the times for filing the briefs for the parties are hereby fixed as follows:

Petitioners' briefs shall be filed on or before January 9, 1963.

Respondents' consolidated brief shall be filed on or before February 4, 1963.

Petitioners' reply brief, if any, shall be filed on or before February 19, 1963.

Court of Appeals Order of December 17, 1962

The parties may file typewritten briefs on the aforesaid dates, to be followed by briefs in printed form within ten days thereafter, and the Clerk is hereby directed to set these cases for hearing on a date as soon after petitioners' reply brief is filed, as the business of the court will permit.

Per curiam.

United States Court of Appeals
for the District of Columbia
Circuit

Filed Dec. 17 1962

JOSEPH W. STEWART
Clerk

Excerpts from Testimony

[29] * *Direct examination by Mr. Hood:*

Q. Would you state your name and business affiliation, sir? A. My name is Charles H. McGuire. I am Vice President, Moore-McCormack Lines, Inc., 2 Broadway, New York City.

. . .

[41] Q. Was the South African trade treated differently from any other in this regard? Were you concerned more with promoting cooperation between the two or three really subsidized lines in that trade than you were in some other trade? A. The provisions of the subsidy contracts relating to—relating to diminution of competition, shall I say, cooperation between the two subsidized lines, were unique.

. . .

[45] Examiner Gray: The document headed "Memorandum," dated [46] February 11, 1954, from S. J. Maddock to Charles Hooper, and bearing identification B64, is identified as Exhibit No. 5 in this proceeding.

(The document above-referred to was marked as Exhibit No. 5 for identification.)

By Mr. Hood:

Q. Mr. McGuire, you will note that in the second paragraph of this memorandum, there is a statement that the "customary procedure with most shippers" is for the shipper to send a copy of the requests for rate reductions to the Conference, "and that we and Farrells usually discuss

* Figures in brackets refer to page numbers of typewritten transcript.

Charles H. McGuire—Direct

such rate requests before anything is decided and then we always quote the same rates."

• • •

[48] A. Picking up my answer as best I can, I would state [49] that the information which I gained from my subordinates after becoming affiliated with Seas Shipping Company respecting the practices touched upon in the second paragraph of this memorandum is not in accord with the statements made in this memorandum. It is, in other words, not my understanding that the two lines, after discussion, always quoted the same rates.

• • •

[51] Q. Mr. McGuire, during this time (that is, the vicinity of November 2, 1955, were such conferences between your line and Farrell, South African Marine, and Dreyfus a relatively common matter?

• • •

[53] Q. Do you recall my question, Mr. McGuire? A. I think I do recall it.

Mr. Ira Ewers: Let the question be read.

(The question was read by the reporter.)

The Witness: The answer is, "No," they were not relatively common happenings.

By Mr. Hood:

Q. Then at this time you would have, again according to your knowledge and speaking only of Robin as a general matter, taken independent rate action; is that what you are saying, Mr. McGuire, that, if you wanted to change a rate, you changed a rate without conferring with any other steamship company? A. In certain instances that did occur. I am not attempting to portray that we did not occur.

Charles H. McGuire—Direct

casionaly confer with other lines. I stated only in answer to your question that this happening was not a relatively common happening, because they were matters that were not directly handled between lines.

• • •

[58] By Mr. Hood: Mr. McGuire, the first sentence of the letter reads: "As requested by Mr. Farrell and Mr. Mercer during our general discussion this morning, I called Alec Cocke of Lykes Bros," etc. Who is Mr. Mercer? A. Mr. Mercer was then, I believe, President, States-Marine Lines or possibly Chairman of the Board. He is now, I believe, Chairman of the Board of States-Marine Lines.

• • •

[5] Examiner Gray: Who appears for Respondent Nedlloyd Lines?

Mr. White: Burton H. White of the firm of Burlingham, Hupper and Kennedy.

• • •

[60] Mr. White: I am of the same opinion as has been announced here a moment ago; while these questions aren't directly affecting our particular interest, I think they are developing a pattern to which I must object. It is not entirely the question that is involved. It is the fact that there is any questioning at all on documents which are simply offered for identification, and it seems to me that the whole process is wrong, and to that I must object, and I hope, unless you agree with me, that my objection shall continue throughout, because I believe that the pattern of questioning is fundamentally and basically wrong.

• • •

[68] Q. Would your behavior be different in the case of a decision to increase the rate than it would in a decision or thinking on a decrease in the rate? That is would you be

Charles H. McGuire—Direct

inclined more to confer with your colleagues in the trade regarding an increase than you would a decrease? A. That is a bit difficult to answer in general terms, Mr. Hood. The assumption logically would be that I would necessarily find more occasion to confer with my competitors in respect of a rate increase than I would in respect of a rate decrease. The practical effect, however, is about the [69] same, in that in this, as in other types of businesses, the practical state of things is that what one's competitors do, one is almost necessarily forced to do as well.

Q. Unless the competitor is raising his prices; is that correct, sir? A. That is correct.

Q. If he reduces, you more or less have to come down, follow suit. A. That is correct.

* * *

[71] Q. Can you tell us in a general fashion what, if any, action was taken by your company as a result of these meetings?

* * *

[72] The Witness: As a result of these meetings, certain details of an arrangement previously arrived at were worked out, and tariff details agreed upon.

* * *

Q. I am sorry, but I didn't catch the last part. A. Tariff details were agreed upon as a result of those meetings.

* * *

[73] Q. Well, Mr. McGuire, during the period of time around June 27, 1956, do you have knowledge of discussions between and among your line, Farrell Lines, South African Marine, Lykes and Dreyfus concerning a proposed general increase in rates in the trade?

* * *

[75] The Witness: As a result of the meetings referred to in the memorandum from McAvoy to me dated June 27, 1956, action was taken to increase or to allow to remain constant certain freight rates in the South and East Africa trade.

*Charles H. McGuire—Direct**By Mr. Hood:*

Q. Mr. McGuire, do you, of your own knowledge, know whether identical action was taken on the part of Farrell South African Marine, Lykes or Dreyfus at this time? A. To the best of my recollection, generally similar action was taken by the other lines mentioned.

. . .

[77] Q. Mr. McGuire, did you have a conversation with Mr. Severiens of Nedlloyd prior to the meeting indicated in R-27? A. I did.

Q. Did Mr. Severiens represent to you that Nedlloyd Line would be bound by a decision reached by you and the Farrell Line?

. . .

[78] Q. I will ask: Can you recall any of the conversation between yourself and Mr. Severiens? A. I have only a general recollection of the conversation.

Q. May we have that. A. That recollection being in general accord with the statement made in this memorandum.

. . .

[4] Examiner Gray: Who appears for Respondent Farrell Lines?

Mr. Maddy: Kirlin, Campbell and Keating by Elmer C. Maddy and Ronald A. Capone.

. . .

[88] By Mr. Maddy:

Unless we are allowed to have this deferral of cross-examination, our position here is very seriously prejudiced.

So, therefore, I want to move that the cross-examination of Mr. McGuire and subsequent witnesses be deferred until the next hearing.

Harold Camp Flad—Direct

Mr. Longcope: I join in that motion on behalf of Dreyfus, Mr. Examiner.

• • •

[4] Examiner Gray: Who appears for Respondent Lykes Brothers?

[5] Mr. Douglas: Covington and Burling by Gerard A. Gesell, John W. Douglas, Peter S. Craig.

[89] *By Mr. Douglas:*

I think we should go through in an orderly procedure, have direct examination and identify all the documents, have Public Counsel now put his cards on the table. At the conclusion there be supplied the specifications and the indications of which of these documents bear on which grievance. We then have a recess, such as you have indicated in your last ruling, and that we come back and have the cross-examination of these witnesses who would still be under subpoena, and go ahead without any new recess on our direct case.

• • •

[91] Examiner Gray: I will rule that the cross-examination may be deferred until Public Counsel has completed his presentation.

• • •

[108] Mr. Hood: I call Mr. Flad as my next witness, Mr. Examiner.

Whereupon, HAROLD CAMP FLAD was called as a witness and, having first been duly sworn, was examined and testified as follows:

Direct examination by Mr. Hood:

Q. Would you state your name and business connection, sir? A. My name is Harold Camp Flad, Moore McCormick Lines, 2 Broadway, New York City.

Harold Camp Flad—Direct

[109] Q. What is your position with Moore McCormick Lines, sir? A. My title is Freight Agent.

Q. Mr. Flad, would you have more to do with the operations of the Robin Line than with any other interests of Moore McCormick? A. I do.

Q. Your direct or primary concern is with the Robin Line, then, sir? A. That is correct.

• • •

[145] *By Mr. Hood:*

Q. Turning now, Mr. Flad, to R8, again, this is a notice from the South African Conference, dated December 6, 1957, directed to "All Lines," I represent that this is one of the documents that was furnished to the Board by the Robin Line.

Mr. Flad, there are some handwritten notations on this document. Would they be your notations? A. Yes.

Q. At the bottom of the document, there is a note, [146] "All Lines agreed." What do you mean by the use of, "All Lines," in this instance? A. I think the word, "All Lines," in this instance could be interpreted to mean Farrell Lines, Robin Line, Lykes Bros. and perhaps States Marine or Safmarine.

Mr. Hood: Mr. Examiner, I should like R8 marked as the next exhibit in order.

Examiner Gray: R8 will be marked Exhibit No. 34.

• • •

[166] Q. Between July of 1956 and April of 1958, you would have participated in discussions with respondents other than Farrell Line, is that correct, sir?

• • •

James A. Farrell, Jr.—Direct

[168] A. With the exception of Nedlloyd; my experience with Nedlloyd was after they had signed 8054.

Q. You neither met with nor had discussions with Nedlloyd prior to their signing 8054, regarding the fixing of rates or tariff classifications or what have you, is that correct, sir? A. That is correct, yes.

• • •

[175] *Direct examination by Mr. Hood:*

Q. Would you state your name and business affiliation, sir? A. My name is James A. Farrell, Jr.; I am President of Farrell Lines, Inc., 26 Beaver Street, New York 4, New York.

Q. Would you give us a brief statement of your personal history in the steamship industry, the extent of it, time and experience? A. I first became associated with the steamship business on a parttime basis while I was at the university in 1922. I formally entered it in 1924. In 1926, I became associated with the predecessor of the present corporation, which employed me.

• • •

[178] *By Mr. Hood:*

Q. Turning next, Mr. Farrell, to document 5039— A. This is a memorandum of February 11, 1954?

Q. Yes, sir.

This was written by you, sir? A. It was.

Q. Are the matters set out therein true? A. Six years ago is a long time for my memory, but I [179] sure they were true at the time I wrote them or I wouldn't have written them.

• • •

[186] Q. There was a practice of free exchange of tariff and rate information and discussions of rate mat-

James A. Farrell, Jr.—Direct

ters? A. There was some exchange. I wouldn't characterize it as free.

[187] Q. Might it be characterized as a guarded co-operation? A. Limited.

Q. Limited, very well.

• • •

[191] Q. Do you have a recollection of how this matter would have been handled or was handled with these lines? A. At that time, it was furtherance of our cooperative efforts with Robin Line and Lykes and, of necessity, with Safmarine. It was not unusual for someone in our company to contact someone in their company and ask if such a rate was agreeable.

• • •

A. The cooperation which existed at that time and between Lykes, Farrell, and Robin, stemming from the subsidy contracts, could not have been effective if one of the leading lines in the trade were to have substantially different rates.

• • •

[214] Q. The memorandum would indicate that Mr. Phillips, that is, J. M. Phillips, canvassed various steamship lines. Do you [215] know who the Mr. Phillips referred to here would be? A. Mr. Phillips is, I would say, the then Secretary of the South and East African Conference.

• • •

[218] Q. At this point in time, that being September 1955, was Mr. Shields under any sort of general instruction to meet and negotiate with other steamship companies in the South African Trade? A. Mr. Shields at this time was Vice-President of Traffic and was in that position for approximately three to four weeks thereafter when his assignment was changed. He was under instructions from me to try very hard to form a conference and in the

James A. Farrell, Jr.—Direct

meantime to do all he could to foster cooperation and higher rates.

Q. Was he authorized by you to commit the Farrell Lines to any rates or tariff classifications? A. He was authorized by me to discuss rates with various lines in the trade, more generally with Lykes, Robin and Safmarine, and to see if the lines could not arrive at some rate uniformity by publication of their own tariffs and filing, each line being free to adopt such rates or not adopt such rates.

• • •

[220] Q. Had you at times been criticized or called on the carpet by the Maritime Administration? A. I wouldn't know how to characterize their looking over our shoulders, but they did, and we had a visit from at least two of their people saying we better do better.

• • •

[221] Q. Did you in connection with any of these matters have any transactions with the personnel of the Board's Regulation Office?

• • •

A. I have knowledge that back of these times there were discussions by representatives of my company and representatives of the shipping companies to adopt and get uniform rates. At the time, at the transition time, from the time we were in a national emergency in 1941 until we were in the state of war, February 1942, and indeed those discussions may have been with Mr. McArt, but I am not sure. The only other discussion that I can specifically recall is that on one occasion a representative of our company was invited to Washington to explain the necessity for increasing rates.

• • •

James A. Farrell, Jr.—Direct

[222] A. The McArt conversation, I believe it was McArt and Lewis and Mr. George Walker, they predated World War 2. I was in the Navy. I was not present, but there were subsequent discussions with representatives of the Office of Regulation by representatives of our company on, I believe, but I am not positive, I believe two occasions responding to inquiries as to why we increased rates. Once it was in response to an inquiry which originated with the South African Government.

. . .

[223] Q. Turning to 5069, Mr. Farrell, a letter dated December 13, 1955, addressed to Steamship and General Agencies, Limited, bearing the typewritten signature F. J. Unver. A. Yes, sir.

Q. Mr. Unver was employed by Farrell at this time, sir? A. He was.

Mr. Hood: May we have this document marked for identification, Mr. Examiner?

Examiner Gray: It may be identified as Exhibit 61.

(The document referred to above was marked "Exhibit No. 61" for identification.)

By Mr. Hood:

Q. Mr. Farrell, at this time what authority did [224] Mr. Unver possess regarding committing the Farrell Line to a rate with Robin? A. He would have general authority at this time to check in rates with Robin.

Q. This would have been without prior clearance with you, sir? A. It would have been within my policy.

Q. You say it would have been within your policy for him to do this without checking with you? A. Yes, and on this date at this time to check in rates with the Robin Line.

John C. Gorman—Direct

Q. By check in, Mr. Farrell, what do you mean? A. I mean to each establish its own rate, but to establish it in cooperation.

• • •

[235] Q. Do you have any recollection of the circumstances of what is here spoken of as an invitation to Safmarine to join the Conference? A. The particular conference which my conversation was about was with Mr. Bamford. No, it was with Mr. Mercer, and it was in furtherance of my conversation of a month previous with [236] Mr. Bamford, which I did, as I did in many times, invite all the lines who would listen to me, any line who would listen to me, to come into the existing South and East African Conference.

Q. On no occasion subsequent to July 1, 1955, was this invitation accepted by any of these lines, however; is that correct, sir? A. Not as regards the particularly existing conference at that time, although beginning November 3, 1955, there was a document drawn up between the Robin Line and the Farrell Line, the Robin then being a trade name of the Seas Shipping Company, which was submitted to Maritime by Robin's counsel on behalf of Robin and Farrell and after suggested revisions, approved July 2, 1956, as FMB No. 8054, now on file.

• • •

[258] JOHN C. GORMAN was called as a witness and, having first been duly sworn by the Examiner, was examined and testified as follows:

Direct examination:

The Witness: John C. Gorman, Farrell Lines, Inc., 26 Beaver Street, New York 4, New York, and I am Vice President of Traffic.

John C. Gorman—Direct

By Mr. Hood:

Q. Mr. Gorman, you stated you are Vice President of Traffic for Farrell Lines. A. That is correct, sir.

Q. How long have you occupied that position? A. Actually since October 12, 1955.

Q. Can you give us a brief recount of your experience in the shipping industry prior to that time? A. I have been with Farrell Lines since 1937. I started off on the pier and then went to the New York office, was in the Operations Department, in the Inward Department, the Outward Department. In 1945 I went to South Africa. I was in South Africa from roughly 1945 to 1950 as Resident Manager for Farrell Lines International Corporation. I returned in 1950 as Assistant to the Executive Vice President and I think on October 12, 1955, I was made Assistant Vice President in charge of traffic and then Vice President in [259] charge of traffic roughly in January of 1956.

. . .

[264] Q. Would the same apply in the case of Nedlloyd? A. Of course, I have seen that letter on the sisal. I don't recall during that period having any other conversation with Nedlloyd on rates.

Q. Other than the sisal, is that what you are saying, sir? A. That is correct. It could be, it could not. I just can't recall.

. . .

Q. Was there any action taken on your part as a result of these conversations concerning the general rate increase? A. Well, I would say there was parallel actions taken, and they would be documented in the tariff changes that are on file with the FMB.

. . .

Alex C. Cocke—Direct

[297] ALEX C. COCKE was called as a witness and, after having first been duly sworn by the Examiner, was examined and testified as follows:

Direct examination by Mr. Hood:

Q. Would you state your name and business affiliation, sir? A. Alex C. Cocke. I am Vice President, Traffic Division, Lykes Bros. Steamship Company, Inc., with headquarters in New Orleans.

. . .

[303] Q. Can you tell us which lines and for how long you have exchanged or sent your tariffs? A. I would say that it dates back with respect to some lines; namely, Robin and Farrell, back to 1941, when they inaugurated the service to South and East Africa with the approval and we might say at the suggestion of the Federal Maritime Board's predecessor, and at that time we were told that on certain rates of strategic materials, we must quote the same rates as Farrell and Robin were quoting, and the authorization to maintain that service was on the basis of absolute and complete cooperation with those lines in view of the fact that there was a shortage of tonnage, and we were really given authority to operate from the Gulf and then back to the North Atlantic due to the fact that we were only allowed to carry strategic materials such as ores, [304] and wool.

. . .

Q. This was, then, the regulation of American steamships really during the time of emergency. A. It was the desire of the predecessor of the Federal Maritime Board and subsequently when we operated after the war, to cooperate to the fullest extent with these lines in so far as exchange of rates and discussion of rates. That continued, I might say, right on through the period that we received the subsidy, and then it was our feeling, and I think the

Alex C. Cocke—Direct

feeling of the Board that that cooperation was more important with the subsidy even so than it was before.

• • •

[307] A. I can recall discussing with both the Robin people, Mr. Maddock particularly, and probably Mr. Shields, the low rates on automobiles and the low rates on petroleum products, with the idea of getting those rates up, and those discussions, I am positive, I can't pinpoint the man in the Bureau of Regulation, but they were certainly well known to everybody. I mean there was no secrecy at any time with regard to any discussions or meeting of the mind that we might have on rate problems.

• • •

[314] Q. Did such cooperation, if I might so characterize it, between you and Farrell and Robin during 1954 take the form of calling on the telephone, say, one of the representatives of the other lines to check to see what their rate was in order that you might not conflict with their rate? A. I couldn't specifically pinpoint that, Mr. Hood, but I can say quite frankly that we did have telephone talks. We did have conversations when we met, that it was all done in our case, and I am sure in their case as sound business judgment, without any, you might say, definiteness that we would do as the other fellow wanted. We reserved our right of action as we saw fit.

Q. One of the factors in this sound business judgment that you mentioned would be not going out of your way to alienate one of these lines by way of reducing a rate on an important commodity without any discussion with them? A. Well, I don't know just how I would answer that, except this, that we may have stepped on some of the lines' toes time to time, because we were sincere in our effort [315] to do the best we could for our service and at times we didn't see eye to eye with them, and they knew it, such as brought out by correspondence between Mr. McGuire and

Alex C. Cocke—Direct

Mr. Maddock on the sisal rate. We generally disagreed with him and notwithstanding, you might say, any pressure that was brought (and pressure was brought), we stood our grounds, because we felt that in the interests of the sisal business to this country, bearing in mind that the users of sisal in this country, several important binder-twine makers, were competing with binder-twine finished products produced in South Africa and Europe, and we were convinced that, if this rate went up to the extent that some of the lines wanted it, it would affect our sisal manufacturers of binder-twine and rope in this country and we just couldn't agree to it.

Q. You mentioned— A. Although at that time we were asked that we continue our cooperation, which we did.

Q. You mentioned that you stepped on the toes of Farrell and Robin on occasion. Is the reverse true of that? Is the reverse of that true also? A. Yes. That is true. It was all above board. Sometimes a man and his wife don't agree on everything. Those things happen. But there was never any undercover stuff as far as I know. It was all sincere in the interests of our lines, and I think I know that Mr. Maddock was sincere and [316] when he wanted the sisal rates up, we could not see our way clear to do as he asked. But as further requests of the National Shipping Administration, we did continue our cooperation.

• • •

[319] Q. You state: "We are perfectly willing notify all concerned as to long-range commitments we have on outward rates." Would you tell us whom you meant by "all concerned"? A. I meant the lines that we were discussing the prospect of considering an increase in rates.

Q. Those lines would be? A. Those lines would be Farrell, Robin, South African [320] Marine Corporation through States Marine, and Dreyfus.

Q. But not Nedlloyd? A. Not Nedlloyd as far as we were concerned, and I don't believe that they were in the

Alex C. Cocke—Direct

picture. They were not in the picture in so far as the Gulf was concerned, and they were not in the picture as far as the North Atlantic was concerned.

• • •

[324] Q. Did Lykes continue to meet with the lines mentioned? A. We had discussion with the lines, yes, and the rates, we agreed in our own good judgment to increase rates, issuing independent tariffs and going our own way, you might say.

• • •

[327] Q. Mr. Cocke, during this period of late 1954, what was your behavior by way of communication, if any, with one of the other lines in this trade, when that line reduced a rate without any forewarning or what-have-you? First, did that occur at any time? A. Can you cite a specific instance?

Q. No, sir. I could not. I have no knowledge of this. A. There were only discussions about rates and there was no definiteness between the lines and the line had a right to do as they darned pleased.

• • •

[331] Q. Did you feel that you had committed yourself, Lykes, to Dreyfus and States Marine, to give a 48-hour notice prior to changing rates?

• • •

Examiner Gray: Mr. Cocke knows whether Lykes Bros. had any agreement or understanding about it. You may answer.

The Witness: I would say that we did not have any agreement. There was an understanding that in discussing these [332] rates 48-hours notice could or would be given.

• • •

Alex C. Cocke—Direct

The Witness: I would say that it is quite possible that discussions increased to a certain extent, but the relationship in so far as matters were concerned didn't improve. There was no mutuality between the lines as to rates except discussions, because there was nothing definite in view [333] of the position taken by the lines that they would not and could not file an agreement as there was actually no agreement and nothing was filed.

By Mr. Hood:

Q. Would you characterize your cooperation with these lines as being something perhaps less than that with Farrell and Robin? A. Oh, immeasurably so, because we were not exactly bound, you might say, but the cooperation between the American subsidized lines has followed a pattern throughout the years, and had not with these other lines because there was no semblance of mutuality of interest or anything else.

. . .

[335] A. The basis of my understanding is indicated in the teletype that after the various talks recently held in New York, if these lines did not have the same rates in their tariffs as Lykes and others, they would check those rates in and increase same effective March 1. And, of course, I can't recall the specific information, but this clearly indicates that the alleged 48-hour notice was just as inoperative as anything before.

. . .

[343] Mr. Hood: Mr. Examiner, may we have document 8917 marked for identification?

Examiner Gray: It will be identified as Exhibit No. 88.

(The document above-referred to was marked as Exhibit No. 88 for identification.)

James P. O'Kelley—Direct

By Mr. Hood:

Q. Mr. Cocke, is the first paragraph of this letter an accurate characterization of your understanding as of May 16, 1955? A. No, sir, it is not. I should not have used the word, "Gentlemen's Agreement", because there was no such agreement.

. . .

[358] Q. Mr. Cocke, have your dealings with South Africa Marine changed in form since that line became a signatory to Agreement 8054? A. I would say that our dealings with SAFmarine and also our dealings with Robin, Farrell, have improved immeasurably since we have that agreement. I think we all have trust in each other more than we have ever had before.

By "trust," I mean real cooperation that we did not have when we did not have any agreement, a hodge-podge, so to speak, of understandings and, at times, misunderstandings.

. . .

[372] Mr. Hood: Mr. Examiner, I call Mr. O'Kelley as the next witness.

JAMES P. O'KELLEY, called as a witness and first having been duly sworn by the Examiner, was examined and testified as follows:

Direct examination by Mr. Hood:

Q. Will you state your name and affiliation, sir? A. My name is James P. O'Kelley. I am Assistant Secretary of Lykes Bros. Steamship Company, 17 Battery Place, New York City.

[373] Q. Would you give us a brief rundown of your background and experience in the shipping industry, sir?

James P. O'Kelley—Direct

A. Since November 1945 I have been with Lykes Bros. in New York, attached to the Traffic Division and since the very latter part of 1954, I have been handling conference matters under the direction of Mr. Cocke from New Orleans in connection with the services that he supervises, and our Vice President in Galveston in connection with the Latin American services.

Prior to joining Lykes, I served in the Navy from 1942 to 1945. Prior to that I was with the New York-Cuban Mail Steamship Company; Yamashida Line, New York; Swayne and Hoyt, which went out of business in 1940, Swayne and Hoyte, Limited.

. . .

[375] A. At some time in December of 1954 or January 1955, had you begun to, yourself, to cooperate more closely with States Marine or South African Marine and Dreyfus with regard to rate matters?

. . .

[376] A. I don't think that I could say that a conclusion was reached, if by that you mean something definitive, because our relationships at that time were of such a nature that we were each pursuing our own ways, and it was merely an ordinary exchange of views on the question rather than conclusions being reached.)

. . .

[377] Mr. Hood: Mr. Examiner, might document 5050 be marked for identification?

Examiner Gray: As Exhibit 99.

(The document referred to above was marked "Exhibit No. 99" for identification.)

. . .

[378] Q. Further in the telegram you state: "We honestly do not feel Safmarine or Dreyfus have failed

James P. O'Kelley—Direct

live up understanding and we think it is their intention to do so on basis we all ahead financially." By "have not failed live up understanding" what understanding are you speaking of there, sir? A. Well, that is a long time ago. But I would say that basically we were telling New Orleans that, although there might have been some areas of differences of opinions, that basically we felt that we all had a common interest and to that end, which would be increase of revenue, rate stability, that the other lines, as their best judgment dictated, would [379] proceed in accordance with the thoughts expressed by them during our conversations.

. . .

[380] Q. Mr. O'Kelley, you state in this message: "certainly there is no understanding whatsoever that Dreyfus agrees name same rates our tariff, understanding is that we exchange tariffs and advise each other before any rates these tariffs changed." Is that an accurate characterization of your understanding at that time? A. Well, I feel that the message speaks for itself, that there was no understanding, that Dreyfus agreed to name the same rates as stipulated in our tariff, but merely that there would be an exchange of tariffs and conversations, expressions of views prior to any change in the rates named therein.

Q. Would that same understanding have applied as far as you were concerned to South African Marine, to Robin, to Farrell, at this time, sir? A. Generally speaking, I would say so.

Q. Would it have applied to Nedlloyd, sir? A. Not at that time.

Q. Did there come a later time when it applied to Nedlloyd? A. After they became a party to 8054.

. . .

William H. McGrath—Direct

[390] Mr. Ira Ewers: Directing your attention to the last full paragraph of Exhibit 104, I think I better read it to you:

“Whereas we thoroughly subscribe to your views that it would be highly desirable that all of the tariffs be published in the same form and include the same rates, there is no understanding that this will be done.”

• • •

[408] Q. What, if any, change in your relationship, meaning Mr. O’Kelley’s relationship, with the people of South African Marine occurred subsequent to their joining 8054? A. If you mean on a personal basis there, I don’t think that question was involved. If you mean from the standpoint of the company—

Q. Yes, sir, but I meant your dealings. A. I would say that, naturally, there was a greater feeling of accord and mutuality of interest between the lines that were parties to 8054, and I am quite sure that it was the sincere hope at that time that very shortly SAFMarine would become a party to it so that there would be a complete bond between the carriers in the trade.

• • •

[427] WILLIAM H. McGRATH was called as a witness and, after first being duly sworn by the Examiner, was examined and testified as follows:

Direct examination by Mr. Smith:

Q. Mr. McGrath, will you state your name and business affiliation? [428] A. William H. McGrath, President, Global Bulk Transport Corporation, 90 Broad Street, New York City.

Q. Would you outline your general experience in the steamship business for us? A. I was first employed in

William H. McGrath—Direct

the steamship business by Furness-Withy, 1934-1937. States Marine Corporation and/or its affiliated companies, 1938 to date, with an interval of 1941-45, when I was on lend-lease to the British Ministry of War Transport and the War Shipping Administration.

Q. Will you outline to us your business experience in relation to the agency agreement of States Marine with South African Marine? A. From the end of 1950 until our agency arrangement with SAFMarine terminated, May 31, 1959, I was Vice President of States Marine Corporation in charge of our agency with SAFMarine.

Q. Was that your sole responsibility during those years? A. No.

Q. It was not? To what extent would that have occupied your time during that time, in a general way? A. 25 per cent.

Q. Mr. McGrath, what authority (I refer now to the agency arrangement with South African Marine) on rates and classification of commodities did you have in that position? [429] I don't want to infer that, in any way, I didn't have higher authority, but I think it was discretionary with me what, if anything, I took up with higher authority, and I would say that as far as daily rate changes, that I seldom, if ever, referred them to anybody above me in the company. If it was a general increase, I notified them that that was contemplated and that was the extent—

Q. Whom would you have notified? A. Mr. H. D. Mercer.

Q. What was his position? A. He was at different times President and Chairman of the Board of States Marine.

Q. During the time of your activities concerning this agency, did you have discussions with other lines in the South African trade? A. Yes.

Q. Which other lines? A. Robin Line. Farrell Lines. Lykes Brothers. Dreyfus. Baron Ino.

William H. McGrath—Direct

Q. Not Nedlloyd? A. To say Nedlloyd, I attended a meeting with Nedlloyd relative to Baron Iino's joining the 8054 agreement, but I never discussed rates with them, with Nedlloyd.

Q. You personally discussed with the lines you mentioned, you personally had these conversations; is that correct? [430] A. Some of them.

Q. Did you exchange rate and tariff information? A. We did.

Q. With these same people? A. We did.

Mr. Zuckerman: May I get clarification, please. Do you mean to include exchange of rate and tariff information with each of the lines you mentioned.

By Mr. Smith:

Q. Was Baron Iino included in the exchanges of information?

Mr. Zuckerman: I didn't ask that. I said each of the lines that were mentioned.

The Witness: In answering that, I believe that our position relative to rates was known to the other lines.

Mr. Zuckerman: I am sorry, we didn't get that. Would the reporter read the response?

Examiner Gray: Yes.

(The answer was read by the reporter.)

By Mr. Smith:

Q. Mr. McGrath, would you tell us what, if any, was the relationship or is the relationship between SAFMarine and Global Bulk? A. Global Bulk Transportation in States Marine Corporations renamed. That change of title was effected—

. . .

William H. McGrath—Direct

[431] Q. I know that. Is there any relationship now with Safmarine? A. Yes. Global Bulk Transport Corporation is the chartering agent for Safmarine at the present time.

Q. No mutuality of ownership? A. No mutuality of ownership.

Q. Mr. McGrath, in your duties as agent for Safmarine, during the early part of 1954, did you exchange rate information with the other lines in the trade? A. I am sure we did.

Q. Mr. McGrath, you are here today under the compulsion of a subpoena, isn't that true? A. That is correct.

Q. The first letter in the packet of letters handed to you by Mr. Hood, the first letter dated April 6, 1954, is a letter from you; is that correct? A. That is correct.

Q. You write that letter, did you not? A. I did.

Q. To Mr. Rees? A. To Mr. Rees.

Q. Who is Mr. Rees? A. At that time Harold Rees was the Manager of South African Marine Corporation Ltd. in Capetown. He has since died.

[432] Q. This letter reflects, does it not, the type of exchange of information to which you referred earlier? Look at the third paragraph, Mr. McGrath.

Mr. White: What was the answer to that question?

Examiner Gray: None. No answer.

By Mr. Smith:

Q. It says: "At that time we advised both Farrell and Robin that we had not been approached", etc. A. That is true.

Q. You refer to this as a rate-cutting maneuver. A. I do.

William H. McGrath—Direct

Q. Under such circumstances you would, as a matter of course, consult with Farrell and Robin? A. I think we would have discussed it with Robin and Farrell and advised them what our opinion was.

Q. What was the result of this consultation? A. I believe—

Q. If you remember. A. —in this particular case there was no change, nothing took place.

Q. Would you have consulted with Dreyfus Line? A. In this particular case, I do not think so.

Q. Nedlloyd? A. No.

Q. Lykes? [433] A. Possibly with Lykes, but probably through Robin and/or Farrell, probably not directly.

Was that your usual procedure with Lykes? A. That was our usual procedure. It was much simpler for us to convey our idea to one American line and with the hope that they would, in turn, convey our ideas to the others rather than spend our time making numerous telephone calls when we would much prefer to have been out calling shippers.

Mr. Smith: Mr. Examiner, may we have this document VH 0036 marked for identification.

Examiner Gray: That will be identified as Exhibit 116.

(The document referred to above was marked "Exhibit No. 116" for identification.)

By Mr. Smith:

Q. Will you turn to the second letter, Mr. McGrath, VH 0053? A. I have it.

Q. You are the author of this letter, is that right? A. I was.

Q. Who is Mr. George Fullerton? A. Mr. George Fullerton, I am not sure of his title, but he was in charge of

William H. McGrath—Direct

solicitation for South African Marine [434] Corporation Limited in Capetown.

Q. At the time this letter was written? A. At the time this letter was written.

Q. Was this letter written in the ordinary course of business? A. Yes.

Q. Would you look at the first paragraph, the third sentence, beginning, "We told them that the business was offered to us at the rate that they were quoting"? A. Yes.

Q. Was that statement true at the time it was written? A. Yes, sir.

Q. What did you mean by the expression "gentlemen's agreement"? A. We had no commitment with Lykes or any other line or an agreement, but we understood that Lykes Bros. had signified their willingness to tell Robin and Farrell 48 hours before they made a rate change.

Mr. Douglas: I move to strike the answer. What he understood Lykes' arrangement with other carriers than his own employers in hearsay and not admissible.

Examiner Gray: I think not, Mr. Douglas. I overrule the objection.

By Mr. Smith:

Q. Does the expression "gentlemen's agreement" have [435] a usage common in the industry, shipping industry?

A. Not that I know of.

Q. What was the significance of the 48-hour notice? A. Again I had no firsthand knowledge of such a statement of intent one to the other except that it was my belief that they would give, one would give the other 48 hours advance notice before effecting a rate change.

Q. What would occur during such 48 hour notice?

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Mr. Douglas: Mr. Examiner, the witness has stated that so far as Safmarine was concerned, they were not parties to any agreement. Now counsel is asking him what could happen when two other carriers—I don't see how he could possibly testify about that, except as a hearsay proposition. He stated frankly and unequivocally that Safmarine was not a party to any so-called 48-hour agreement or notice and counsel has asked him how that alleged agreement operated.

Examiner Gray: Well, he can certainly state what he knew or believed to be the case. Go ahead, Mr. McGrath.

The Witness: I believe the intent was to allow a time lapse so that, if one line felt that the action of the other in making a rate change was detrimental to rate stability, that they could then make their position clear to the line that was in favor of this in the hope that possibly that action would not take place.

By Mr. Smith:

[436] Q. I take it in the case of the shipment described in this letter, you did not receive 48 hours notice? A. In the letter I think you will find later on, Mr. Smith, that Mr. Colton advised me that they were now giving 48 hours notice to us.

Q. What is the answer with relation to this shipment? You did not receive 48 hours notice? A. Oh, no. He told me on the telephone he was giving us 48 hours notice, which he did not have to give us nor were we entitled to receive.

Mr. Douglas: May I have the answer to the last question read. The question and the answer, please.

William H. McGrath—Direct

(The question and the answer were read by the reporter.)

Mr. Douglas: Thank you, Mr. Examiner.

By Mr. Smith:

Q. Mr. McGrath, look at the next paragraph, the second sentence beginning, "We pointed out to Mr. Colton". What did you mean when you said "apparently a gentlemen's agreement with Lykes had no substance"? A. When we found out that this business had been done at a \$3 rate, to be sure that it had been done, I checked with the Atlantic American lines. I am not sure whether I checked with Robin, Farrell or with both. They had no knowledge of Lykes' intention to quote such a rate or do business [437] at such a rate as the tariff rate in effect at that time, I believe, was \$3.25. In my subsequent conversations with Mr. Colton, I told him that it was my belief that he had indicated a willingness to give the other lines 48 hours notice, that apparently here it hadn't been done.

Mr. Smith: Mr. Examiner, may we have this document, VH 0053, marked for identification.

Examiner Gray: Identified as Exhibit No. 117.

(The document referred to above was marked "Exhibit No. 117" for identification.)

By Mr. Smith:

Q. During the time you had duties in relationship with the agency agreements with South African Marine, was that carrier a member of any conferences in the South African-United States trade? A. It was Safmarine's policy not to join either the United States Gulf or United States Atlantic—South African Conference, or have any agreement with any other lines.

William H. McGrath—Direct

Q. Can you give me any reason for that policy? A. Safmarine, as a matter of policy, followed conference rates, Atlantic and Gulf, to the extent that they could, appreciating the fact that they loaded in both areas, and therefore, if there was ever any discrepancy or disagreement between the Atlantic and Gulf conferences, they were in the [438] position they had to go one way or the other, but they did as a matter of policy, follow conference rates, and they notified shippers to that effect.

They were interested in rate stability. They were content to operate within a rate structure that was satisfactory to the American lines. They did feel, however, that they wanted to maintain their own freedom of action in the best interest of the shippers, the receivers, the South African government and Safmarine.

Q. You speak of the South African government. Would their relations with the South African government been different had they belonged to a conference? A. That I cannot say. I have no way of knowing.

Q. Mr. McGrath, turn to the letter, VH 0033, dated November 6, 1957. A. I have it.

Q. You wrote that letter, did you not? A. I did.

Q. To whom? A. Mr. J. G. Finlay.

Q. Who is he? A. Mr. Finlay was the Managing Director of South African Marine Corporation Ltd., Capetown.

Q. This letter, I take it, was an ordinary type of letter in the ordinary course of business; is that correct? [439] A. It was.

Q. In the third paragraph you describe or you state that you are going to have lunch today with a shipper and with Robin and Farrell. Do you recall that incident? A. I do.

Q. Which representatives of Robin and Farrell did you meet? A. I am quite sure it was Mr. McGuire of Robin Line and Mr. Gorman of Farrell.

William H. McGrath—Direct

Q. What did you mean when you stated "keep him away from U. S. Navigation"? A. We were interested in obtaining business for Safmarine.

Q. What part did U. S. Navigation play in this? A. U. S. Navigation, you will see from the preceding paragraph, had carried some business for AFEX.

Q. As agent for Baron Iino or Baron Line at that time maybe? A. Baron Line or Baron Iino Line. I am not sure when the changes went from Baron to Baron Iino.

Q. Speaking of an equitable freight rate, could you state any result of this meeting? A. What I meant by an equitable freight rate?

Q. No. What was the result of this meeting in so far as any equitable freight rate was concerned? [440] A. There was no result.

Q. No rate was decided upon? A. No rate was decided upon. We asked Mr. TenEyck what rate he felt was necessary in order to keep business in the United States. There was a lot of discussion about this commodity moving in competition with the United States from North Europe and we never did get from Mr. TenEyck what he felt was a rate which would keep the business there and which he was willing that the lines each charge for participating in the carriage of this particular commodity.

Q. Would it be an ordinary event for you and representatives of other lines in this trade to meet with the prospective shipper? A. Not a regular thing. There were such meetings, but not regularly, by far.

Q. You would more likely discuss this with the shipper alone; is that correct? A. That is correct. We each had an individual position we wanted to maintain.

Q. And upon arriving at such an individual position, you would notify the other lines; is that correct? A. I would say that we had told them that we had no objection to telling them what our position, what our intended position would be. I don't say that we told them in every case.

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[441] Q. Ordinarily would you have given them 48 hours notice? A. I never remember giving any line 48 hours notice of a rate change.

Q. More or less? A. Mr. Smith—

Mr. Douglas: Mr. Examiner, he has answered the question. He said he didn't give them 48 hours notice.

Examiner Gray: Go ahead.

By Mr. Smith:

Q. Did you give him more than 48 hours notice? A. More than 48 hours notice was automatic in the filing of our tariff.

Mr. Smith: Mr. Examiner, may we have this letter VH 0033 marked for identification, please.

Examiner Gray: Identified as Exhibit 118.

(The document referred to above was marked "Exhibit No. 118" for identification.)

By Mr. Smith:

Q. Mr. McGrath, in early 1959 did you have more discussions with Baron Iino or any at all? A. Early 1959 was the first discussions that I really had with Baron Iino, not more.

Q. With whom did you have these discussions? [442]
A. With Mr. Hopkins.

Q. Mr. Hopkins. Will you tell us who Mr. Hopkins is?
A. I believe Mr. Hopkins is Vice President of the United States Navigation Corporation, agents for Baron Iino Line.

Q. Thank you. What was the purpose of these meetings? A. The purpose of one meeting I had was at the

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invitation of Farrell Lines to attend a meeting in their office to enlarge upon an invitation to the Baron Ino Line to become a signatory to 8054.

Q. Did anyone else in your organization have discussions with Baron Ino? A. I don't know.

Q. Mr. McGrath, will you turn to the next document, XQ 186? A. I have it.

Q. Can you identify this document as one coming from the files of South African Marine furnished under the subpoena duces tecum? A. It appears to be a letter from the South African Marine Corporation's Solicitation Department in Capetown to the Solicitation Department of States Marine in New York.

Q. Are you familiar with this document? A. I have seen it before.

[443] Q. You have seen it? A. Yes, sir.

Q. Who is Mr. Demarco? A. Mr. Demarco was my assistant in the traffic end of States Marine's agency representation of Safmarine.

Q. Who is the author of this letter? A. It is a Mr. R. Knoop, who was a solicitor, I believe, for Safmarine in Capetown, working under Mr. Fullerton.

Q. Look at page 2 of that document. A. Yes.

Q. Next to the last paragraph. A. Yes.

Q. Do you know the meaning of that? A. I believe I would know why Mr. Knoop said it, but I believe I can tell you why he said it.

Q. Don't tell me why you believe he said it. A. It was our policy to generally follow conference rates. All the solicitors would have said our rates were the conference rates. Farrell was a conference line. Robin, as far as I know, followed conference rates, and that we would not generally have reduced a rate below the conference rate. It wasn't our policy.

Q. Thank you.

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Mr. Smith: Mr. Examiner, may we have this document [444] XQ 186 and 187 marked for identification.

Examiner Gray: Yes. The two pages described are identified as Exhibit 119.

(The document referred to above was marked "Exhibit No. 119" for identification.)

By Mr. Smith:

Q. Mr. McGrath, will you look at the next document, XQ 167? A. I have it.

Q. Could you tell me who wrote this telegram? A. No. The initials at the end of the memorandum in our office usually signify who made up any part of the message. "LB" was Larry Buser. "AP" was Tony Pilaro. I don't know offhand who the initials other than those refer to, but we can certainly find out without any trouble.

Q. Have you ever seen this document before? A. I have.

Q. Was it one supplied in response to the subpoena duces tecum? A. Yes.

Q. By the South African Marine? A. Yes.

Q. This would have been a telegram sent in the ordinary course of your agency activities; is that correct? [445] A. It would.

Q. Would you tell us who Mr. Buser is? A. Mr. Buser was also one of my assistants working with Mr. Demarco.

Q. The telegram refers to rate on bulk tallow? A. It does.

Q. Was some sort of mutuality on a bulk tallow rate reached around February 9, 1959?

Mr. White: Mr. Examiner, I must object to this unless it is indicated with whom this alleged mutuality was attained.

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By Mr. Smith:

Q. With all the lines in the trade.

Mr. Zuckerman: Mr. Examiner, I object to the answer unless we have a definition of "mutuality."

Mr. White: I think the question itself, even with the modification, is a little uncertain, because, when you talk about all the lines in the trade, they are not the same in both directions.

By Mr. Smith:

Q. Which direction does bulk tallow move? A. From the U. S. A. to South Africa.

Q. Was accord on bulk tallow rate reached around February 9, 1959, between the carriers carrying bulk tallow?

Mr. Douglas: Mr. Examiner, I ask that that "carriers [446] involved" be specified and that this general conclusion of accord be defined more precisely.

Mr. Maddy: I would like to join in that objection on the ground that he is asking for a conclusion rather than the evidentiary facts which will lead to that conclusion.

Examiner White: Well, ask him which lines.

By Mr. Smith:

Q. Which lines carried bulk tallow? A. Safmarine carried bulk tallow.

Q. Did Lykes? A. Lykes carried bulk tallow, I believe. Farrell Lines, Baron Iino, Robin Line, to a lesser degree. I don't know to what degree any particular line carried tallow except Safmarine.

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Q. Did the lines that you mentioned quote the same rate on bulk tallow on or around February 9, 1958? A. I believe that the tallow rate that became effective the 1st of May was a \$20 rate, and I believe that rate was quoted by all of the lines.

Mr. White: By all of the lines you mean the ones you have just specified; is that right?

The Witness: Yes. I don't know what Nedlloyd's rate was from the Pacific, so I don't know whether they quoted \$20 or what.

Mr. Smith: Mr. Examiner, may this document, XQ 167, [447] be marked for identification.

Examiner Gray: Identified as Exhibit 120.

(The document referred to above was marked for identification as "Exhibit No. 120.")

By Mr. Smith:

Q. The time period, mid-1958, was there more cooperation among the lines in the South African trade than there had been previously? A. Mid-1958?

Q. If you remember. A. I would say that as time went on there was more communication between the lines from the time Safmarine originated their service in 1947 through the years, there was more and more communication.

Mr. Zuckerman: May we have clarification, Mr. Examiner, as to what lines were involved in this communication during that period?

Examiner Gray: Can you tell us that, Mr. McGrath?

The Witness: Basically, with Farrell, Robin, Lykes, to a lesser degree Baron Iino.

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By Mr. Smith:

Q. Was there more business in the South African trade after mid-1958? A. More than when? More business?

[448] Q. Yes. A. More than when?

Q. More than previously.

Was that a better time than it had been in the past? A. I don't think so. You would have to compare with previous years. You would have to get statistics out. I honestly couldn't answer it.

Q. That is all right.

Could you turn to the next document, XQ 153? Who is the author of this telegram? A. It appears to be a cable sent by Larry Buser of our office to Safmarine, Capetown.

Q. Have you seen this document before? A. I have.

Q. Was it furnished in response to the subpoena issued to Safmarine? A. I believe it was.

Q. Do you know that it was? A. No, I had nothing to do with supplying any of these documents.

Q. But you had seen this document before? A. I had seen this document.

Q. It would have been a document sent in the ordinary course of business; is that correct? [449] A. It would.

Mr. Maddy: May I ask a clarifying question.

Mr. Smith: Yes.

Mr. Maddy: At the time these documents were supplied, I presume they were supplied from the files of Safmarine?

The Witness: Safmarine, when our agency agreement terminated with Safmarine, the end of May 1959, they took with them any files that were active for earlier dates, any active files going back to earlier dates, so those files whatever Safmarine had in their possession, despite the fact that it was prior

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to the termination of our agency agreement, and they might have been considered States Marine files, they had them and I believe they supplied them.

Mr. Maddy: So actually in your position, you had nothing to do with the various documents which were supplied?

The Witness: I also went through the files of what was left with me and extracted certain documents, I believe, and sent those down. This would not have been one of them.

Mr. Maddy: So far as that was concerned, you were not responsible and involved in furnishing this document?

The Witness: Not to my knowledge.

Mr. Maddy: Thank you.

By Mr. Smith:

[450] Q. In the relations with the shipper here discussed, did a united front exist between all lines? A. On June 6th, the date of this memorandum—

Mr. Maddy: Mr. Examiner.

Mr. White: Just a moment.

Mr. Maddy: In view of the answer, I won't object.

Mr. White: I just would like to know who all of the lines are, Mr. Examiner. This is the same situation as we had before. Maybe we can have some general understanding about who the lines are that would eliminate these objections.

By Mr. Smith:

Q. Mr. McGrath, did you state in June 6, 1959, you didn't have anything to do with this particular event?

William H. McGrath—Direct

A. Our agency arrangement with Safmarine terminated May 31, 1959.

Q. Would you give us a reason why Mr. Buser would have sent this?

Mr. Maddy: I didn't mean to interrupt your question.

Mr. Smith: Go ahead.

Mr. Maddy: I object to your question on the grounds that it calls for hearsay. You are going to have Mr. Buser here later anyway.

Mr. Smith: Not if I can avoid it.

Examiner Gray: I will sustain the objection.

By Mr. Smith:

[451] Q. Mr. McGrath, did Safmarine become a signatory to 8054? A. States Marine as agent signed the 8054 agreement for Safmarine, I believe, in September 1958.

Q. '58. A. I believe it was '58.

Q. Yes, that is right.

Mr. Smith: I don't have any more questions, Mr. McGrath. Thank you very much.

The Witness: Thank you very much.

Examiner Gray: You may step down, Mr. McGrath.

(Witness excused.)

Mr. Ewers: Do you want 153 identified?

Mr. Smith: I call Mr. Larry Buser.

Laurence J. Buser—Direct

Whereupon—

LAURENCE J. BUSER was called as a witness and, after first having been duly sworn by the Examiner, was examined and testified as follows:

Direct examination by Mr. Smith:

Q. Mr. Buser, will you state your name and business affiliation? A. Laurence J. Buser, Vice President, Traffic, South African Marine Corporation, New York.

Q. Will you outline your general experience in the [452] steamship business? A. I started with States Marine Lines in June 1947. I was with them until the Safmarine sale, when Safmarine was sold rather, in May of 1959, and I have been with Safmarine NY since then.

Mr. Maddy: Could I ask a clarifying question?

Mr. Smith: Yes.

Mr. Maddy: You speak of a sale. A sale from whom to whom?

The Witness: South African Marine Corporation was sold, the controlling interest was sold from Henry Mercer or Henry Mercer and Associates to South African Industrial Development Corporation.

Mr. Maddy: Thank you.

By Mr. Smith:

Q. Would you tell us your general authority on rates and classifications of commodities while you were, during your experience connected with South African Marine? A. During the time I was with States Marine, I, under Bill McGrath, my authority was limited. I would say that all of the authority with regard to rates rested with Bill McGrath. I had very little authority indeed. As far as the present is concerned, the responsibility of rates rests with me; that is, since the first of June 1959.

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[460] Mr. Hood: I call Mr. Drost as the next witness.

Arend Drost—Direct

Whereupon—

AREND DROST was called as a witness and, after first having been duly sworn by the Examiner, was examined and testified as follows:

Mr. White: Mr. Examiner, before the witness is questioned, may it be understood that this witness appears here under subpoena issued at the request of Public Counsel.

Examiner Gray: Yes.

Direct examination by Mr. Hood:

Q. Would you state your full name and business affiliation? A. My name is Arend Drost. I am Treasurer of Java-Pacific Line, Inc., 25 Broadway, New York City.

[461] Q. Could you list for us the other officers or key officials of Java-Pacific Lines, sir? A. The President is Mr. J. C. Severiens. Then the Vice President is G. P. Keers. And the Secretary is Mr. F. C. Williams.

Q. What was the last name, sir? A. F. C. Williams.

Q. Mr. Drost, would you state the relationship between Java-Pacific and Nedlloyd Line, if any? A. Java-Pacific Line, Inc., is the general agent in the United States and Canada for the Nedlloyd Line.

Q. How long has Java-Pacific occupied that relationship? A. Since 1939, or we might say better since the creation of the Nedlloyd Line.

Q. Would you outline briefly your background in the shipping industry, sir? A. I have been with the Java-Pacific Line, Inc., since 1939; when the war broke out I was assigned temporarily to the Rotterdam Lloyd's, who had transferred their headquarters to New York. After the close of the war I was temporarily assigned to the Netherlands Shipping Mission in Washington, which was until about 1945.

Q. Mr. Drost, what authority does the Java-Pacific pos-

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sess with regard to alteration in the freight rates charged [462] by Nedlloyd?

Mr. White: Mr. Examiner, I don't mean to interrupt particularly, but for the purpose of clarification of the record, it should appear that Nedlloyd Line is merely the trade name of a joint service of two companies. Perhaps Public Counsel would like to develop that for the purposes of clarification.

Examiner Gray: Yes.

By Mr. Smith:

Q. Mr. Drost, will you then, first, explain to us the nature of Nedlloyd Line? A. Nedlloyd Line is the trade name for a joint service of the Netherlands Line in Amsterdam and the Royal Rotterdam Lloyd in Rotterdam on the basis of an agreement filed with the Federal Maritime Board and approved. I don't recall the number of it.

Q. Now, sir, will you tell us what the authority is of Java-Pacific with regard to the establishment and the alteration of freight rates charged by the Nedlloyd Line?

A. Well, our principals, Nedlloyd Line, who are in Holland, informed us that, when they commenced the service from South and East Africa to the Atlantic Coast, we should follow conference rates generally, and perhaps with a few exceptions, where it is considered to their advantage to do so.

[463] Q. Can you tell us what authority was in Java-Pacific you personally possessed with regard to rate matters? A. With respect to routine rate matters I have authority to ascertain what the conference rates are so that we may know what rates we should quote to our customers.

Q. Who makes the decision on what rate you shall quote, sir? A. I do in routine and in most cases on the basis of the information I receive from the conference.

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Q. By the conference, can you tell us who you mean, sir? A. I believe it is called the African-Atlantic Coast Conference, of which Mr. Phillips is the Secretary.

Q. You have stated that you generally followed conference rates? A. That is right.

Q. By that did you mean you were concerned primarily with the rates of the conference you mentioned alone or the rates of that conference and carriers not members of that conference in the trade? A. As a basis we took the conference rates and we thought the other lines were quoting the same rates, which seemed to be the case in most instances, although occasionally we found out that different rates were quoted or that there was a difference of opinion between the conference and other [464] lines in the home-ward trade.

Q. Over the course of the past five years, then, you would have been checking on the rates of the carriers generally in this trade; is that correct? A. I did, yes.

Q. Can you tell us generally what your service has been over the past five years between the United States and Africa, and when I say what your service has been, I meant outbound, inbound and to which of the United States coasts? A. Well, we have had service from the Pacific Coast to Africa via the Panama Canal for many years, which used to return from Africa via the Philippines to the Pacific Coast. I think it was in 1954 the Nedlloyd Line decided that they should not come back via the Philippines any longer, but should come back through the Pacific Coast around Africa, through the Mediterranean via the Atlantic Coast, possibly the Gulf, through the Canal and back to the Pacific Coast.

Q. You say that has been the state for about five years? A. Since 1954, yes, sir.

Q. Then outbound you were rarely loading cargo other than from the Pacific Coast; is that correct, sir? A. So

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far as I know we never loaded cargo from the Atlantic Coast or the Gulf to South and East Africa.

Q. Inbound you did carry cargo to the Atlantic and [465] Gulf as well as the Pacific, sir? A. Yes, sir.

Q. About what has been the frequency of your service, sir? A. Approximately monthly service.

Q. And that has been the same over this six-year period that we speak of? A. Yes, sir.

Q. Mr. Drost, can you give us any background on any cooperation, if any, that existed between your line (that is, Java-Pacific, agent for Nedlloyd) and any other lines sailing in the trade between the United States and South and East Africa? A. Well, the cooperation which existed was to the extent that I asked Mr. Phillips, the Secretary of the Conference, homeward, whether he would be kind enough to let me have a tariff so that I would know how to make up my own tariff in order to follow my instructions to quote conference rates, which he did and, in return, I sent him one of our tariffs.

Q. When would there have been, sir? A. At the inception of the service in 1954, homeward from Africa to New York.

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[466] Q. Mr. Drost, did you have conversations directed toward the exchange of rate information with any carriers other than those represented or other than Mr. Phillips representing the conference carriers over the past five or six years? [467] A. Yes, sir.

Q. Who would those conversations have been with and can you tell us approximately when they might have been, sir? A. Well, it would have been the Robin Line and I would not know whether you would consider them conversations or whether it would be contact by telephone in order to check up on rates they may be quoting, because occasionally I received the impression, after talking about Mr. Phillips, trying to find out what the rate was that he

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wasn't sure what the Robin Line rate was, and I found it necessary for our own interest to check up on it.

Q. Again you are restricting your use of rate to mean inbound from Africa? A. Inbound rate, yes, sir.

Q. You mentioned Robin Line. Any other line in the service, sir? A. I never contacted any other line.

Q. Did you, in your contacts— A. Pardon me, I had contacts with the other lines after our company signed up Agreement 8054, but I am talking now about the period prior to that.

. . .

[469] Mr. Hood: Mr. Examiner, may we have the letter dated March 24, 1955, to Nedlloyd, Amsterdam, marked for identification.

Examiner Gray: Identified as Exhibit No. 124.

(The document referred to above was marked "Exhibit No. 124" for identification.)

By Mr. Hood:

Q. Mr. Drost, in the first paragraph of this letter you indicate that certain increases and changes in freight [470] rates, and I quote, "have been tentatively agreed upon between the conference lines and Robin." Can you give us the basis for your statement that there had been a tentative agreement? A. That must have been given to me (I don't remember it in detail) by Mr. Phillips because that is the man with whom I had contact about freight rates.

Q. And the latter part of that, "who are still in communication regarding the same with Dreyfus Line and Lykes, besides ourselves," the communication with Dreyfus and Lykes, you would have obtained that information from Mr. Phillips also, sir? A. From the same source, yes.

Q. Do you recall the extent of any exchange that might have gone on between yourself and the representatives of the conference, Robin, Dreyfus, or Lykes, during this

Arend Drost—Direct

period regarding any general increase in rates, sir? A. No, sir, I have no way of knowing that.

Q. In the third paragraph of this letter, Mr. Drost, you state (and I quote), "Of particular interest we mention that on sisal and sisal tow, an increase of only \$1 was agreed". Can you tell us what you meant by the word or phrase "was agreed"? A. That was meant to state that that was the information I received from Mr. Phillips that apparently the conference and perhaps others had agreed to this increase.

[471] Q. By this, you were not saying, sir, that Java Pacific had agreed— A. No.

Q. —but that your information was that there had been some understanding or what have you among some other lines? A. That's correct.

Q. Mr. Drost, would you turn to a document dated May 13, 1955, also bearing your name and also addressed to Nedlloyd, Amsterdam? Are you the author of this document, sir? A. Yes, I am.

Mr. Hood: Mr. Examiner, may we have the letter of May 13, 1955, written by Mr. Drost to Nedlloyd, Amsterdam, marked for identification?

Examiner Gray: This will be identified as Exhibit No. 125.

(The document above referred to was marked as Exhibit No. 125 for identification.)

By Mr. Hood:

Q. Mr. Drost, there is quoted in this memorandum a telegram which reads:

"Farrell Robin Dreyfus Safmarine Lykes we agreed increases as per circulars attached outlets," et cetera.

A. Yes, sir.

Arend Drost—Direct

Q. Can you tell us what you mean or meant by the use of [472] the word "agreed," there? A. I don't know what the rates or subject was, but I do know that I must have been informed by Mr. Phillips that these rates had been agreed upon or had been consulted with, and they asked me, and I said, "I think that this is a sensible rate."

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[476] Q. Were you at this time, as a general practice, giving some advance information to Robin or Farrell regarding your intentions on rate changes? A. Well, it was not a general practice, but when Mr. Phillips arranged to keep me posted by his tariffs of any changes which the Conference made in the rates, it happened sometimes that these tariff corrections reached us quite a bit later than when the actions were decided upon. As a result of which, I asked him if it would be all right if he telephoned me immediately when an important item had been changed so that I would be on the same basis as everybody else.

And I thought it was only fair that if I took action that I would notify them of the change I made in our tariff.

[477] Q. This notification by you, then, would have been as soon as you had reached the decision ordinarily by telephone rather than waiting until an announcement might be published, so to speak, circulated to the holders of your tariff? A. I would telephone them, yes, like they telephoned me, to keep me posted of their changes.

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Q. Could you elaborate slightly on what you meant here by "independent action?" A. Well, it is perhaps a little loosely used here. I [478] mean, we were entirely entitled to take whatever action we wanted.

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[480] Q. Is that inbound trade restricted to a very limited number of commodities, sir? A. Our chance of com-

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peting successfully from South and East Africa is limited mainly to items from British East Africa and possibly Portuguese East Africa because of transit time which is unfavorable for us on account of a different route that we follow than the other lines.

Q. That would be a very limited number of items, sir?

A. Comparatively limited number of items, yes, sir.

Q. Can you mention the items that would be involved, sir, [481] or commodities? A. Well, the principal ones would be coffee, tea, barks, and sisal.

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[489] Mr. Hood: Mr. Examiner, may the letter of September 18, 1956, to Holland Africa Line be marked for identification?

Examiner Gray: As Exhibit No. 137.

(The document above referred to was marked as Exhibit No. 137 for identification.)

By Mr. Hood:

Q. In the second paragraph, second sentence, Mr. Drost, you state: "You will recall that sometime ago when the first increase was received on paraffin wax, we communicated with the American lines here." A. That's right.

Q. Who did you mean by, "The American lines here?"

A. Through Mr. Phillips—

• • •

[490] Q. But would the communicant have been you, Mr. Drost, communicating with— A. With Mr. Phillips.

Q. Restricted to Mr. Phillips, again? A. Yes, sir.

Q. By the use of the word "they", you mean Mr. Phillips? That is, "They assured us." A. Well, that would be the Conference.

Arcnd Drost—Direct

Q. And the next sentence, you state: "It was agreed at the time that we would quote the same rate," et cetera.

Q. What do you mean, or did you mean, by "it was agreed", sir? A. Well, it really meant that our views were the same as theirs were, that it would be suitable to quote the outward rate.

Q. You had no quarrel, in other words? A. No. I thought it was a sensible decision to make [491] for them.

. . .

[494-495] Q. You did not attend any meetings of the 8054 group prior to your becoming a signatory, sir? A. I did not. I didn't know there were any.

Q. What were the circumstances surrounding your becoming a member of 8054, sir? A. Well, so far as I could recollect, there were occasional invitations extended to become a member. But we had strict instructions from our principal, the Nedlloyd Line, not to enter into any agreements with any lines. And on the basis of—these invitations also were written to the principals, stating the advantage or disadvantage there might be in joining it, and I believe correspondence about it went on for two years before finally the go-ahead signal was given to join Agreement 8054.

Q. Is it your opinion as a man with considerable experience in the industry that 8054 has been of benefit to the operators and members thereof? A. Well, if you mean has it resulted in any higher freight rates, I am sorry to say it has not.

Q. How would you characterize the results of 8054, sir? A. Well, I would say it is an excellent way of exchanging thoughts and problems and what steps could be taken to promote the commerce between Africa and the United States to the benefit [496] of the lines themselves and possibly to the shipping public.

G. P. Keers—Direct

Q. In your opinion, the Agreement, or the existence of the Agreement itself, fosters freer communication, generally, on problems of the trade, sir? I am not restricting this to fixing of rates now, but rather, as you said, promoting commerce. A. It promotes relations, but it continues the competition among the lines.

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Mr. Hood: Call Mr. Keers as the next witness, sir.

Whereupon,—G. P. KEERS was called as a witness and, having been first duly sworn by Examiner Gray, was examined and testified as follows:

Mr. White: As in the instance of Mr. Drost, may it appear on the record that Mr. Keers is attending here pursuant to a subpoena issued at the request of public counsel?

Examiner Gray: Yes, Mr. White.

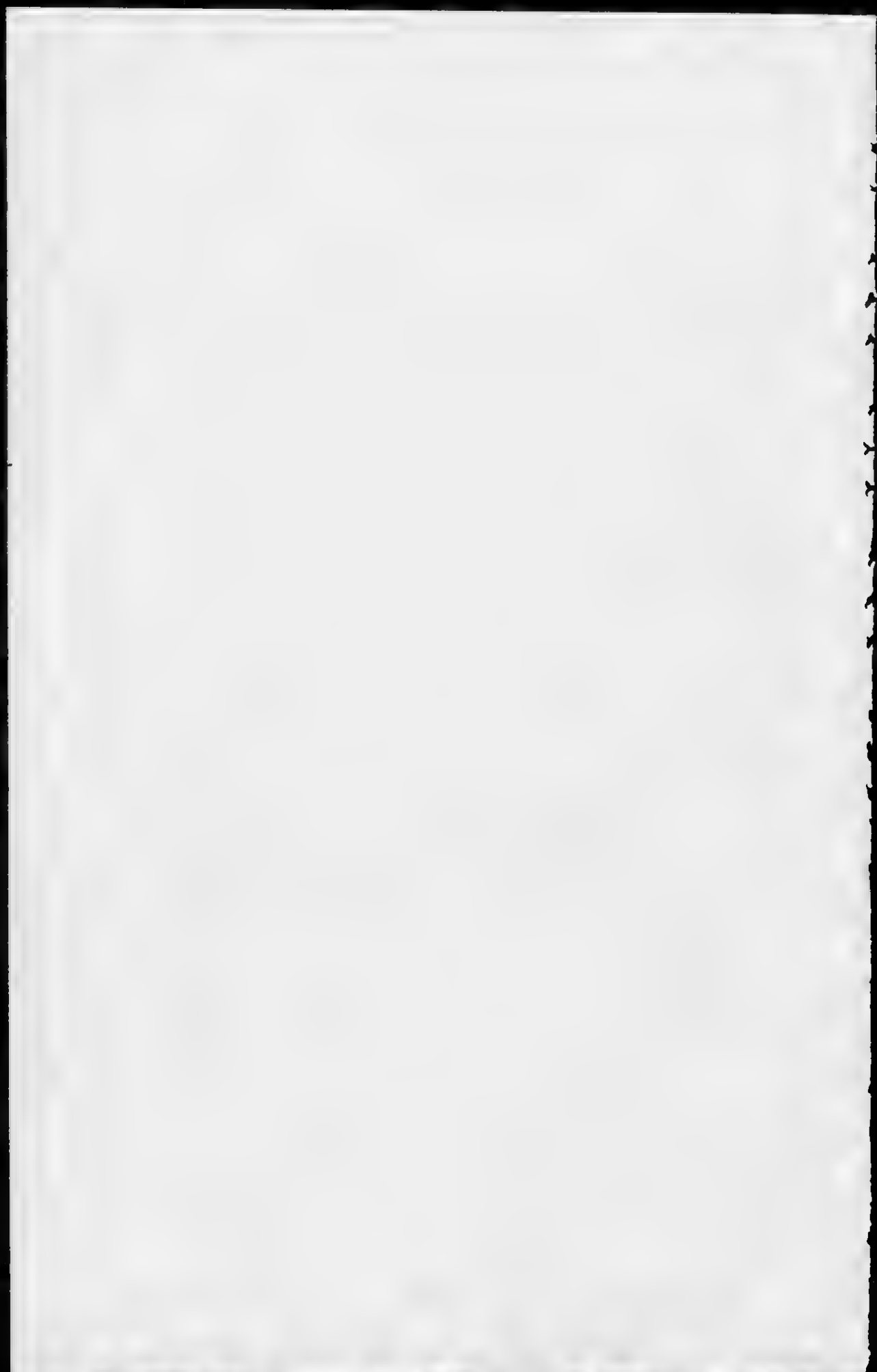
Direct examination by Mr. Hood:

Q. Would you state your full name and business affiliation, sir? [497] A. My name is G. P. Keers, K-e-e-r-s, Vice President of Java Pacific Line, Inc., general agents for Nedlloyd Line.

Q. Would you give us a brief background of your experience in the steamship industry, sir? A. I commenced as a ship's officer and, after obtaining my Master's license, I was offered and accepted—

Mr. Zuckerman: Would you keep your voice up, sir?

The Witness: I was offered and accepted a position as an assistant manager in a steamship office in



G. P. Keers—Direct

Semarang, Java, owned by the Nederland Line of Amsterdam. Later, I became manager of that office. In the following year, that is 1930, I became assistant to the chief accountant of the Nederland Line in the then-called Netherlands Indies, located at Batavia.

In 1932, I became operations manager of the Java Bengal Line in Calcutta. Then, I was also in charge of the Royal Dutch Airlines' head agency at India and Burma. In 1934, rather, '35, I became manager of an office of trading company, Late Hegt and Company in Rangoon, Burma, where I was manager of the shipping division.

After that, I returned for a brief time to Calcutta and left in 1936 for the United States where I joined, towards the end of that year, in New York, the representative for the United States and Canada for the Nederland Line and Rotterdam Line as Executive Assistant.

In 1939, the Java Pacific Line, Inc., was formed, and [498] I became a treasurer of that company. During the war years, I was employed in the Netherlands Indies Maritime Commission in New York. Subsequently, I was secretary to various committees of the Netherlands Ministry of Shipping in London, charged with devising plans for post-war reconstruction of the Netherlands Merchant Marine.

1944, I became Executive Assistant to one of the managing directors of the Netherlands Shipping and Trading Company in London. After that, I returned to the United States where I rejoined, after a little interval, the Java Pacific Line, Inc., as vice president, which I have been up to this date.

- Q. Mr. Keers, what is the extent of your personal authority within your company regarding the fixing of rates?
A. In this particular trade?

G. P. Keers—Direct

Q. In this trade, sir, yes. My questioning will be directed to USA-South and East Africa. A. In this particular trade, the Nedlloyd Line have charged their general agents, Java Pacific Line, Inc., to follow, as a matter of policy, the rates quoted by the U. S. by the Africa-U.S. conference at New York with, perhaps, certain exceptions, but basically to follow those rates.

Q. How do you participate in the decision to alter a particular rate whether it be to follow the Conference or not? A. I participate in inter-office discussions when they concern policy matters. The President of Java Pacific Line has [499] the authority to change rates within the framework of the authority given by Nedlloyd Line. In his absence, I perform that function.

Q. Is a good deal of your attention directed to the outbound from the Pacific Coast of the United States to South and East Africa movement, sir? A. No, sir.

Q. No, sir? A. No, sir. My attention is equally directed to, I would say, all sections of the Nedlloyd Line, of which the Nedlloyd Africa Line forms only a small part.

Q. You are quite familiar with this movement that you spoke of? A. I expect to be familiar with most of the subjects which, and I hope that I will, will be brought up.

Q. In your opinion, what is the extent of the competition between the Pacific Coast and the Gulf and the Atlantic Coast on the outbound movement to South and East Africa? A. It is very negligible.

Q. Mr. Keers, have you participated in any conversations or exchanges regarding rate matters or tariff classifications with any of the other lines sailing in the United States-South and East African trade? Now, I am asking you for the period prior to July of 1958. A. Prior to July of 1958, if you discussing matters of [500] rates or meetings—

Q. Yes, sir. A. —none of the staff of Java Pacific Line have attended such meetings.

G. P. Keers—Direct

Q. Did you have telephone conversations or exchanges of correspondence with any of the other carriers in the trade prior to that time, sir? A. In the course of our formal contacts with the trade with all lines, not only Africa lines, it was, of course, from time to time, you were meeting some of your colleagues in the other offices. And then, there might be, on occasion, an exchange of views might be expressed. But as always in all these years prior to our becoming a party to the Agreement, we have tried to religiously steer clear of anything which would go beyond that.

Q. Which would go beyond that, you say, beyond your usual casual conversations? A. Beyond a usual casual conversation. And, as shipping men, to express an opinion on a subject perhaps, or a view, which undoubtedly would come up at times.

Q. Mr. Keers, have you participated in the meetings of the members of the Agreement 8054 since you became a member yourself? A. Normally, I have not participated in those meetings which mostly dealt with routine matters. I have a few months ago. I think that was one of the first times I attended a [501] meeting which was requested, I believe, by Mr. Farrell, in order to discuss the possibility of forming a conference.

Q. This would have been the only meeting, or there may have been one or two others. Generally, you don't attend these meetings? A. If there have been, I don't know. I don't recollect. I don't think so.

Q. Mr. Keers, your steamship company is competitive with Baron Iino Line, inbound, is that correct, sir? A. Up to December of 1959, Baron Iino never had, to my knowledge, a sailing which was fully competitive with ours.

Q. By "fully competitive," do you mean that you did not call the same ports? A. I don't mean that. The routing of our Africa service is different from that of the other lines in that we proceed around Africa from South to North and return through the Suez Canal to New York and the

Laurence J. Buser—Recalled—Cross

other lines proceeding via Capetown. And, therefore, there is immediately the geographical situation whereby from ports in South Africa, our transit time is so that we cannot compete very well. We will try to get some cargo; we do get some cargo, but it is not an important matter.

Q. About what is the difference in your transit time and that of the other lines, sir? A. I would think about ten days.

Q. You taking how many? [502] A. We taking an average of 28 days from British East Africa to New York.

Q. Mr. Keers, do you know of any understanding reached between any or all of the lines who were members of Agreement 8054 and the Baron Iino Line? A. I do not.

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[544] Examiner Gray: I confess that I have great sympathy for all parties, including Public Counsel, but it is obvious to me that the respondents are entitled to a more direct specification of such charges, if they may be termed that, and as to which of the respondents have agreed with which other respondents, and I think that, as I recall Mr. Longcope's suggestion, request, that [it] would be in order, that within a period to be fixed, that such information be supplied to respondents.

• • •

[652] Laurence J. Buser, recalled.

Cross-examination by Mr. Poor:

Q. Mr. Buser, when you were in Washington you were asked by Mr. Hood—this is at page 452 of the testimony—“Would you tell us your general authority on rates and

Charles H. McGuire—Recalled—Cross

classifications of commodities while you were, during your experience, connected with South African Marine?"

And then your answer was: "During the time I was with States Marine, I, under Bill McGrath, my authority was limited. I would say that all of the authority with regard to rates rested with Bill McGrath."

Is that testimony true?

A. Yes, sir.

Q. It's true then and true today? A. Yes, sir.

By Mr. Zuckerman:

Q. Is the balance of the answer also still true, Mr. Buser? "As far as the present is concerned, the responsibility [653] of rates rests with me; that is, since the first of June 1959"? A. That is correct. I do report to the president of the company, of course, but—

Q. I'm interested primarily in the date. A. The date? The June 1 date?

Q. That's correct. A. Oh, yes, definitely. That was the breaking point.

Q. Thank you.

• • •

[658] C. H. McGuire, was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Cross-examination by Mr. Ira Ewers:

Q. Your name is C. H. McGuire? You have previously been identified and sworn in these proceedings? A. That is correct.

Q. And you have collaborated with your counsel in preparing certain comments which you think pertinent to this inquiry? A. I have.

Charles H. McGuire—Recalled—Cross

Q. Now, if you will direct your attention for the moment to Exhibit 3, which is the letter that you wrote, particularly the last paragraph, where you expressed the hope that the subsidized lines would reconcile their disagreements, will you state whether or not those views reflected your personal or your official views or both? A. At that time they reflected both my personal and my official views.

Q. And does it now? A. It does.

[659] Q. Will you please state why you believe it reflects the official views of the Commission? A. I do not think there can be any question about it. Going as far back as the Alexander Committee report, it was recognized that rate stability was desirable in the interest of both shippers and ship operators and that principle has been reaffirmed in a number of subsequent adjudications.

The principle has never been departed from to my knowledge, but since the Maritime Commission's right to fix rates in the foreign trade is questionable to say the least, the implementation of that aim has not become complete.

However, over 150 conference agreements to that end were approved by Maritime and are currently operative.

Because of international complications, ocean rates cannot be stabilized as are our domestic transportation rates. The conference system is about as close as we have been able to come to it.

. . .

[660] When Mooremack purchased the Robin Line vessels in 1957, the Commission in its letter of April 25, 1957, required Mooremack's operating differential subsidy contract to contain the same clause.

This was not entirely new to Mooremack because it has always been Mooremack's policy to follow the rates of other carriers when there was no Conference or when Mooremack did not belong to the Conference.

[661] Also, in 1955, a similar coordination clause, but without the rate and pooling language, was inserted in its operating differential subsidy agreement because of the

Charles H. McGuire—Recalled—Cross

double tracking on Trade Route 24. Maritime decided to make a coordination clause standard in all operating differential subsidy agreements and debated in which form it should be. It decided to adopt the clause without the rate and pooling language, which is now standard in all operating differential subsidy agreements as follows:

"To the extent from time to time prescribed by the United States, the Operator shall and it hereby agrees to coordinate the spacing, regularity and frequency of its sailings to and from all points on Trade Route No. 1, Trade Route No. 6, Trade Route No. 15-A, and Trade Route No. 24, respectively, in conjunction with the operation of any and all other subsidized services on each of said respective trade routes. In addition to any other remedies which may be available to the United States, no subsidy shall be payable in respect of any voyage which does not conform to the requirements of the United States for such coordination of the spacing, regularity and frequency of the Operator's sailings, unless the United States determines that such failure to conform was caused by less than thirty days' notice of such requirement or by circumstances beyond the Operator's control. The requirement by the United States of such coordination shall constitute its consent thereto for the purpose of the [662] provisions of Article II-18 (c) hereof and any other provisions of contract or statute requiring such consent."

Although we never doubted that carrying out this coordination did not need specific approval, questions were raised, and the last sentence of the clause was added out of caution.

Also, in aid of rate stability, the Maritime Administration, pursuant to Administration Order No. 58, in all of its approvals of the charter of subsidized vessels to others, imposes the following condition:

"The charterer must maintain conference rates in connection with the operation of the vessel, including the rules

Charles H. McGuire—Recalled—Cross

and regulations pertaining to said conferences, irrespective of whether it is a member of such conference."

Mooremack has at all times tried to live up to these directives.

Q. Mr. McGuire, these clauses originally made, their appearance in the Seas Shipping Company, American South African contract, are they both subsidized lines? A. That is correct.

Q. And do you have knowledge, or do you believe that similar clauses are now contained in all operating differential subsidy contracts? A. The latter quoted coordination clause is now, within my knowledge, standard language in all operating differential [663] subsidy agreements.

Q. Are similar policies applicable in any sense to foreign lines, or to unsubsidized lines? A. The principle involved is the same, but there is much greater power of implementation over the subsidized lines because of their operating differential subsidy contracts. However, rate cutting has been specifically condemned in the case of foreign lines as well as American operators.

• • •

[665] The record shows that Agreement No. 8054 was originally entered into between Robin Line and Farrell Lines. It was first submitted to the Federal Maritime Board in November, 1955, revised later in accordance with suggestions of the Office of Regulation, and was finally approved by the Federal Maritime Board on July 2, 1956.

• • •

[666] Q. In this case, Mr. McGuire, the principal question seems to have been whether certain of these discussions and agreements should or should not have been filed with the Office of Regulations. You have made reference to one quotation here that in carrying out the coordination clause, the Board in [667] advance gave all of the approvals

Charles H. McGuire—Recalled—Cross

necessary, either by law or contract. Is that your understanding? A. That is correct.

• • •

Q. You say that you did urge the other lines to join, that you were mandated by your subsidy contract and by the division in S.1 to maintain rate stability as between Farrell and, first, the Seas Shipping Company and then Moore-McCormack Lines. A. That is correct.

• • •

[675] Q. And you would expect that their conduct would be covered by the standard provisions of the operating differential subsidy agreement? A. I would.

Q. With some form of coordination clause? A. I would. Additionally, I would believe that they as well would be bound by another section of the operating differential subsidy agreement, which I don't believe, Mr. Examiner—

• • •

[677] Q. Following Mr. Hood's suggestions, are there any other sections of your operating differential subsidy contract which in any way govern your activity, the activity along the lines that we have been discussing today? A. There are two sections, particularly in Part 2 of the operating differential subsidy agreement that I believe would be pertinent to this subject and binding upon us as upon all other subsidized operators since Part 2 of the operating differential subsidy agreement is standard as to all subsidized operators. They are, firstly, 2-1 captioned "Efficient Operation."

"The Operator shall conduct its business and its operations with respect to the vessels, services, routes and lines covered by their agreement in the most economical and efficient manner, but with due regard to the wage and Manning scales and working conditions prescribed by the United States as provided in Title III of the Act."

Charles H. McGuire—Recalled—Cross

The other section is Section 2-3, captioned, "Development of American Flag Merchant Marine."

"The Operator shall cooperate with the United States and with other American flag companies in the development of the American Flag Merchant Marine as a whole and wherever [678] practicable, the operator shall favor American flag companies in transshipping cargo, in selecting foreign and domestic agents, and other representatives in the rental of terminal and other facilities and in related matters."

Q. So am I correct, Mr. McGuire, that you and your company find yourselves in this dilemma that along with all other steamship companies in the foreign trade, you have had certain objectionable practices condemned, and even though there isn't complete implementation, there is some implementation of that condemnation, but that you have also found yourselves mandated by your subsidy contract, first, to coordinate, including rates, to operate efficiently and to cooperate in the development of merchant shipping in general and that among that is the stabilization of the trade, which has repeatedly been found to be desirable? And you believe that your efforts that you have described have been in a reasonable implementation of those mandates? A. I do so believe.

. . .

[679] Mr. McGuire would you describe your position in the Office of the National Shipping Authorities, which you testified to began in February, 1951? A. That isn't exactly correct, technically, Mr. Douglas. I was appointed Director of the National Shipping Authority February 13, 1951. In later organizational change that became successively, next, the Office of National Shipping Authority and Government Aid and, at a later period of time, I believe, approximately the beginning of 1954—beg pardon, 1955, it became the Office of National Shipping Authorities.

. . .

Charles H. McGuire—Recalled—Cross

[680] Q. Do you recall other episodes in which you sought to mediate differences in this trade that rose as a result of different views about rates? A. I do.

Q. And were some of those discussions, or your participation in them, made known to the Office of Regulations? A. In at least one instance, yes.

Q. To whom in the Office of Regulations? A. Mr. Tibbott.

Q. Do you recall what the commodity was that was involved? A. The commodity in that instance as I recollect it was chrome ore and manganese ore.

Q. And do you recall when your efforts took place? A. I can't with specific period of time. It was prior to the creation of the Office of National Shipping Authority. My recollection would be it was approximately the year 1949. [681] I was at that time, I believe, Chief of the Traffic Division of the then U. S. Maritime Commission.

. . .

[690] Mr. McGuire, you mentioned certain provisions that [691] were in your company's operating-differential subsidy contract which required rather extensive cooperation and coordination between yourselves and the Farrell Line I believe. For convenience sake, could you give us the paragraph number that you were referring to in the contract? A. In the original operating-differential subsidy agreement of Seas Shipping Company, Inc., Contract No. MCe-145, dated October 14, 1938, there appeared a section, Section 12, captioned "Development of American Flag Merchant Marine." That provision of that operating-differential subsidy contract was and is unique, being inserted within my knowledge only in the contracts of two subsidized lines. It has never appeared in this form in any later contract except to the extent it was incorporated by reference for a limited period of time in the Moore-McCormack Lines' interim subsidy agreement when they pur-

Charles H. McGuire—Recalled—Cross

chased the Robin Line Division of Seas Shipping Company and later eliminated in the final contract.

Q. So that its first elimination from your steamship line's contract came following Moore-McCormack's purchase. Is that correct? A. One portion of that section was eliminated from our contract and from Farrell Lines' contract in 1958 within the best of my recollection. In respect to Moore-McCormack it was eliminated when the final form of FMB-48 was adopted.

. . .

[694] Q. You further testified, Mr. McGuire, that there was no intention on your part to be surreptitious or what have you about what was going on in the trade after you joined Robin Line, that you did not really hide anything from the Regulation Office. Did you have any discussions that you can recall with members of the Regulation Office regarding any problems in the trade subsequent to 1955? A. As I believe I testified earlier, Mr. Hood, I did have discussions on several occasions after I joined Seas Shipping Company with members of the Office of Regulation respecting the situation in the South and East Africa trade.

Q. What generally were the matters which you disclosed to these people at that time? A. I indicated some degree of concern with the existing situation and expressed the view that we should take steps to regularize that situation and that that view was held strongly as well by Farrell Lines.

Q. Did you go into any details as to the extent of communication among or between all lines or the lack of it?

[695] A. I cannot state in any appreciable degree that I did detail the situation in respect of any individual lines or the lines collectively except that I did discuss the situation in general terms with employees of the Office of Regulation.

. . .

James A. Farrell, Jr.—Recalled—Cross

[712] JAMES A. FARRELL, JR., recalled:

By Mr. Maddy:

Q. Mr. Farrell, at page 191 of the record, I believe you testified previously as follows—you gave this answer: "At that time, it was the furtherance of our cooperative efforts with Robin Line and Lykes, and, of necessity, with Saf-Marine. It was not unusual for someone in our company to contact someone in their company and ask if such a rate was agreeable."

And then, this further question was asked: "Mr. Farrell, you said, 'Of necessity, Safmarine.' What do you mean by that, sir?"

And in response, you gave this answer: "The cooperation which existed at that time Lykes, Farrell, and Robin, stemming from the subsidy contracts, could not have been effective if one of the leading lines in the trade were to have substantially different rates."

Now, Mr. Farrell, I wonder if you could explain in some great detail what you had reference to in your last answer that I just read? A. Briefly, the point is this: That the three American lines were, and still are, cooperating in response and under the protection of their subsidy contracts. They consider their subsidy contracts to be mandatory, relating to the attainment of a rate level which will permit them to build and replace [713] their ships and which will permit them to perform the contractual obligations.

• • •

[714] A. And I would like to say here now in substance what I said on November 4, 1959, before the Congressional Subcommittee of the Judiciary on Monopoly, Mr. Celler's Committee.

I then said that the South and East African trade route, Essential Trade Route No. 15-A, was the first and, broadly speaking, is still the only essential trade route on which two American subsidized lines compete directly, double-tracking and exactly paralleling each other.

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James A. Farrell, Jr.—Recalled—Cross

[716] "The operator"—this means both Farrell and Seas—"will space the sailings of its vessels and"—underlining—"establish, publish and maintain rates, charges, classifications, tariffs, regulations, and practices on a basis satisfactory to the Commission."

Contract MCo-62430 was in effect until December 31, 1957 and was replaced by a renewal effective January 1, 1958, which contract now in existence is designated as FMB No. 64.

The new contract, different from the two preceding ones, did not contain the clause above quoted, because by that time Farrell and Seas had entered into a rate agreement, No. FMB 8054, and this was in full force and effect.

• • •

[717] As the years have gone along, Farrell Lines, formerly American South African Line, together with the Robin Line, presently a Moore-McCormack Division, have been able to cooperate as directed by these subsidy contracts.

The problem, however—and this touches on the reply I'm making to my counsel—has been how to cooperate with another American-flag competitor who did not wish to join any conference in 1938 and, in fact, did not until November 1955 join in FMB Agreement 8054, known generally as the "Forty-Eight Hour Agreement."

This situation was further complicated in that the other principal participants in the trade, namely, States Marine Company, as agents for the South African Marine Corporation—there has been a change of ownership since I wrote this—and Lykes Steamship Company all had to follow a similar pattern if the cooperation between the two American companies required by the Maritime Board was to be effective.

For reasons best known to themselves, all of these companies were slow to join in a solid conference agree-

James A. Farrell, Jr.—Recalled—Cross

ment, and still are, although each and every one of them had then been repeatedly invited to join with Farrell Lines in Basic Agreement No. 3579, then on file with the Maritime Board, which had been on file since October 15, 1934.

Necessary conformity obviously required conversations.

[718] This is specifically answering counsel.

Necessary conformity obviously required conversations which generally but not always resulted in the quotation of similar rates. But each line then published its own tariff independently and still does. Each line then and still does—was not committed to apply any rate schedule.

As time went on, this hodgepodge resulted in all lines on different dates becoming signatories to FMB 8054, the so-called "Forty-Eight Hour Agreement," and this agreement for the first time legally obligated all parties to the agreement to give 48 hours' notice of any change in rates.

We contend, of course, that all actions taken by Farrell Lines between August 5, 1938 and the date when all parties listed finally agreed and signed the so-called "Forty-Eight Hour Agreement" were taken openly. There was never anything clandestine about our acts. And they were reflected in the rate schedules which were always filed with the Federal Maritime Board and its predecessor.

The decision of the United State Maritime Commission of August 5, 1938 was carried out and is still being carried out.

The provisions of our operating-differential subsidy contracts previously referred to were complied with, and the further directive—and I'm quoting from the contract—"that the operator, Farrell, shall cooperate with the United States [719] and with other American-flag companies," which, of course, includes Lykes, "in the development of the American-flag merchant marine as a whole"—has been fulfilled.

Q. Mr. Farrell, I believe you testified that your operating differential subsidy contract which became effective

James A. Farrell, Jr.—Recalled—Cross

January 1, 1958 did not contain this so-called rate cooperation clause you referred to previously. Now, in that connection did you receive a letter or a copy of a letter from Mr. Elmer Metz, then Chief of the Office of Government Aid, concerning this proposed new clause to be inserted in place of the rate cooperation clause you previously referred to? A. I did.

. . .

[720] Q. Was that clause exactly the same as the one appearing in the Farrell contract? A. Word for word.

Q. Now, did Mr. Metz advise that the new proposed clause would better serve the purposes of all concerned? A. That's the tenor of his letter.

Q. However, did Mr. Metz predicate his suggestion of a new clause which would eliminate the rate cooperation feature upon Moore-McCormack actually joining the then existing South Africa Conference? A. That was my understanding of the letter. However, Moore-McCormack elected not to join the then existing South African Conference but to join in by concurrence in 8054.

. . .

[722] Mr. Farrell, at pages 219 and 220 of the record you were questioned concerning Exhibit 60 and the statement made in that letter that Mr. James Farrell does not wish to get into a position vis-a-vis the Robin Line and the Maritime Administration whereby Farrell Line would be accused of not obtaining a higher rate which is warranted by present market conditions. In that connection you explained that in view of the obligations of the Farrell Line under its subsidy contract you did not wish your company quoting rates lower than Robin or, for that matter, than Lykes, and be exposed to criticism for not having gotten the high dollar for the Government.

In response to a further question from Public Counsel, you stated that you received a visit from two people from Maritime who said, in effect, that you had better do better.

James A. Farrell, Jr.—Recalled—Cross

Now, I want to ask you in connection with this latter matter: Were these visits which were received by Farrell Line made in late 1954 by Mr. Overstreet and Mr. O'Connor to your company at your offices? A. They were, and their visits were pursuant—in pursuance of a clause in our contract which I believe is standard in all subsidy contracts, which reads:

“Efficient Operation. The operator agrees to conduct its business and its operations with respect to the vessels, [723] services, routes and line referred to in this agreement in the most economical and efficient manner but with due regard to the wage and manning scales and the working conditions prescribed by the Commission.”

I have always understood economical operation and efficient operation included then and includes now the attainment of rates which make the operation of a subsidized shipping line economically feasible and which will protect the Government's interest in its loans, its guarantees, and its recapture.

Q. Now, the provision that you just read into the record, Mr. Farrell, that was in your subsidy contract which remained in effect up until December 31, 1957? A. Yes, and I'm not sure but I believe it's in the third contract. The secretary of my company is nodding yes.

Mr. Hood: Mr. Maddy, may I interrupt a moment? We have Mr. O'Connor and Mr. Overstreet mentioned. I wonder if you could identify them.

By Mr. Maddy:

Q. Could you identify Mr. O'Connor and Mr. Overstreet? A. Yes. Mr. O'Connor and Mr. Overstreet were at that time associated with the Trade Routes Division of the United States Maritime Commission, perhaps associ-

James A. Farrell, Jr.—Recalled—Cross

ated also with the Examining Section, and I understand their obligation was to see that contracts were fulfilled and performances were as [724] good as could be obtained.

Q. Now, when Mr. O'Connor and Mr. Overstreet were in your offices, was the competitive situation vis-a-vis the Robin Line discussed with Mr. O'Connor and Mr. Overstreet? A. Yes, sir. I discussed the matter in 1954 and 1955 with Messrs. Overstreet and O'Connor, and I discussed it in the presence of Mr. C. Carleton Lewis and Mr. John Gorman.

Q. And was it gone into in rather great detail at that time? A. I can't specifically recall word for word but these gentlemen were with us a long time and no stones were left unturned.

Q. Now, Mr. Farrell, at page 22 of the record you testified that on two occasions representatives of your company had discussions with representatives of the Office of Regulation responding to inquiries as to why you had increased rates in the South African trade. A. Yes, sir.

• • •

[726] Q. I see. Now, Mr. Farrell, do you have any other information as to other specific instances where there were discussions between Farrell Lines and people in either the Federal Maritime Board or the Federal Maritime Administration concerning rate matters and matters concerning competition in the South Africa trade? A. I have already indicated the Overstreet-O'Connor discussions.

We have now discussed the February 16, 1955 incident.

There was an incident on June 21, 1955 when Mr. Gorman consulted with Mr. Tibbott with regard to the desire of the South African Shipping Board to be informed by the Federal Maritime Board as to the reason for rate changes.

There was an occasion on December 19, 1957 when Mr. Phillips was queried by Mr. Tibbott as to rate changes.

James A. Farrell, Jr.—Recalled—Cross

And again on the 17th of May 1955 a similar inquiry from Mr. Tibbott to Mr. Phillips.

And then on or about June 2, 1958 Mr. John Gorman visited Washington to go into some detail regarding our rate structure with a Mr. Spencer who was Director of Traffic of the federal Maritime Commission at that date.

This was also I believe—but I'm not certain—responding to an inquiry originating in the Union of South Africa.

Then prior to 1955—and I regret I don't have any [727] paper support of this except I have had the verbal confirmation within the last week—representatives of our company—Admiral Walker—discussed matters with Mr. McArt. Mr. Shields discussed matters with Mr. Hallett and Mr. Tibbott. Mr. Shields discussed matters with Mr. Tibbott and Mr. McGuire. And I discussed these rate matters with Messrs. McArt, Andrews, Darr and McGuire. Unfortunately, prior to 1955 I do not have a diary.

Q. Now, based upon these instances which you have detailed, was it your understanding that the Federal Maritime Board and various individuals in the Federal Maritime Administration were fully aware of the efforts of the Farrell Lines to achieve a stable rate situation in the trade?

A. I know they were—I know they were aware that we were attempting to achieve a stable rate situation.

• • •

[728] Q. Now, Mr. Farrell, were you personally or anyone in your company ever advised by anyone in the Federal Maritime Board that they considered that your efforts to achieve a stable rate situation during the years 1954 through 1958 was illegal? A. No, sir.

Q. Do you believe that the situation that existed in the trade was in part due to the belief that the Federal Maritime Board did not consider your efforts to keep a stable rate situation improper under the circumstances that

Alex C. Cocke—Recalled—Cross

existed? A. My belief was that we were mandated to maintain a stable rate situation, and we tried to do so under great difficulties.

• • •

[731] Q. Isn't it a fact that in general the South Africa trade of this country is a depressed rate trade, to use that sort of expression? [732] A. Yes, sir. Shouldn't be, but is.

• • •

[753] ALEX C. COCKE was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

• • •

[754] *Cross-examination by Mr. Douglas:*

Q. Mr. Cocke, the record indicates that Robin and Farrell first filed Agreement 8054 with the Board in November 1955. At about that time was Lykes asked to join 8054? A. Lykes was asked to join 8054.

Q. And why did Lykes refuse to join at that time? A. Lykes reluctantly refused to join as we were not willing at that time to agree to 48 hours' notice in advance of rate changes and to discuss rates if we did not see fit to do it.

• • •

[756] Q. In late 1954 and early 1955, did Lykes want to file a document with the Board similar to that subsequently embodied in 8054? A. Yes, out of an abundance of caution we did. The other carriers advised—and I think all of them did—that they didn't think there was any legal reason why they should come in to such an agreement, and they stated that they were not willing to do so at that time.

So, naturally, we did not pursue the matter further or attempt to file anything, because we felt that one line could not file if the others didn't. So that was the reason the matter was forgotten about, so to speak, at that time.

Alex C. Cocke—Recalled—Cross

After a short while it became apparent that some of the carriers would not file because they did not want to be bound.

Q. Will you describe the circumstances under which Lykes entered the South and East African trade?

• • •

[758] So, feeling that we wanted to continue to maintain a berth service, keep our staff occupied, we approached the Federal Maritime Board, or, rather, at that time the Maritime Commission, and told them that we had ships available and we would consider going into that trade from the Gulf if we were permitted to do so.

At that time most of my conversations were with Mr. Darr and Mr. Andrews, who were generally in charge of traffic and of trade routes and matters of that kind.

They were very pleased at our desire to commence this service. They said it would have to be done with the [759] approval of Farrell and Robin and that we would be required in the interest of national defense to operate homebound from South Africa to the North Atlantic carrying such cargoes as might be designated by them—rates and the commodities to be handled more or less through Farrell and Robin.

Q. Do you recall when your first sailing was? A. Our first sailing was in January 1941.

Q. Now, how did you avoid conflict with the rates of Farrell and Robin? A. Well, we were told by the Maritime Commission that on inbound cargo we must quote the same rates as Farrell and Robin and be more or less guided in the bookings by those two companies.

We were also told that on outbound commodities, particularly competitive commodities, we must follow these lines—the Farrell, who was a member of the conference, the conference lines, and Robin, who were quoting the same rates.

Alex C. Cocke—Recalled—Cross

So to all intents and purposes we were mandated by the Maritime Commission as of that time to cooperate to the n-th degree with these lines and to quote their rates.

• • •

[760] Q. Now, did the Maritime Commission at that time advise you that you were forbidden to discuss rates with other [761] carriers in the South and East African trade? A. No, as a matter of fact, Mr. Douglas, they told us to do so. They wanted entire cooperation between the North Atlantic lines, these two American lines, and Lykes out of the Gulf. Particularly as we were at that time an unsubsidized line to South and East Africa, and— Well, all through the years it's the same story. The Maritime Commission, the Federal Maritime Board, and the various agencies have looked upon the South African trade as a depressed trade, of vicissitudes, much competition. And it's been our understanding to cooperate to the fullest extent.

Q. During World War II what happened to Lykes' South and East African service? A. Well, during World War II our ships were requisitioned—as I recall, sometime in 1942, very promptly after we got into war. We were permitted to operate vessels in the South and East African trade subject to the Maritime Commission's approval and subject to the rates put in by them.

Mr. McArt, as I recall, was head of the Division of Rates of the War Shipping Administration, and Mr. McGuire, as I also recall, was his assistant.

• • •

[764] A. Well, right after the war was over, my recollection is that Mr. McArt—I think Mr. McGuire was probably there to—called us to Washington. There were representatives of Farrell there—a representative of Farrell there—a representative of Robin, and I represented Lykes. And said that while the war was over, still the Government was

Alex C. Cocke—Recalled—Cross

going to maintain control over rates and requested that we go back home and adopt the War Shipping Administration tariff as our tariff.

. . .

Q. And the rates which Mr. McArt instructed you to adopt were the same for the Gulf ports as the Atlantic ports, is that right, on the competitive commodities? [765] A. On the competitive commodities.

Q. And you regarded that as an instruction from the government, did you not, the rates which he sent down to you? A. We were told. It was a very nice way to do that, and there were certain instructions coming directly from the government.

Q. After the conference with Mr. McArt in 1946 and prior to 1954, did representatives of Lykes discuss rate matters with representatives of Farrell and Robin? A. Oh, yes.

Q. Do you know whether or not these discussions were—the existence of these discussions was known to representatives of the Board's Office of Regulations? A. I am positive they were.

Q. Did anyone in the Regulations Office at this time or prior to that time suggest or indicate in any way that Lykes or the other carriers should file an agreement which would authorize rate discussions? A. Not at all.

. . .

[766] Q. Was the Regulations Office of the Federal Maritime Board aware of the increase by Lykes and the Atlantic carriers in early '55? A. It certainly was.

Q. Did the representative of the Gulf South and East African Conference, to your knowledge, receive any inquiry about the increase announced by that Conference? A. He received, as did Mr. Phillips, a letter dated, as I recall, February 16, 1955, inquiring as to the reason for the increase. At that time the Gulf South East African Con-

Alex C. Cocke—Recalled—Cross

ference was also known as the Lykes Conference because we were the only active member in it. And immediately Mr. Carllys, who was chairman of that Conference, received the letter, he called my attention to it, sent me a copy of it, and we discussed it. We discussed it at quite some length, and it was not replied to by letter due to the fact that just about that time, Mr. Carllys and I were in Washington attending a Federal Maritime Board hearing, and the matter of the Fabre Line. And Mr. Burton White is smiling about that. So we decided to call on the Bureau of Regulations and discuss the matter with them. I remember it very distinctly because I don't care too much for snow and cold weather, and just about that day Washington had a very heavy snow storm when we were in there talking to Mr. Tibbott.

And we discussed the matter quite frankly with Mr. [767] Tibbott. He knew very well the troubles and trials and tribulations of the South and East African trade because I think almost every trip we went to Washington on, we would cry on his shoulder and others about how bad conditions were on the outside, the competition of Dreyfus, the competition of Safmarine, and if things were not going at all good, as in previous years, in that trade. We told Mr. Tibbott quite frankly that this was an opportunity to put the rates up. Expenses had increased, revenue had gone down, and South African rates were not comparable to the rates in other trades, and that we felt, based on information we had, that our competitors would come up also.

And he apparently accepted that verbal explanation, as I don't believe anything further was heard from him.

Q. Have there been other situations within the past six years other than this February 1955 meeting when you advised the Regulations Office of the developments in the South African trade? A. Yes. There were a number of instances where we advised officials of the staff of the Maritime Commission, the Maritime Board, about con-

Alex C. Cocke—Recalled—Cross

ditions in the trade. There is in the record an exchange of correspondence about the sisal rate situation.

• • •

[768] Q. Did Mr. Tibbott give you any advice concerning that? A. Yes, he suggested that we put our case before the State Department. Several lines—Farrell Lines and Robin—discussed the matter with the officials of the State Department. Our people down in South Africa did, and the South African Government assured us that they were going to continue to give a reasonable or equitable portion of their cargo to the American lines.

Q. Was Mr. Tibbott's suggestion that you, as Lykes, cooperate with Farrell and Robin in approaching the State Department to cope with this problem? A. Mr. Tibbott thought that a joint approach by the three lines would be most helpful.

• • •

[787] The exchange of rate intentions in advance has had the same stabilizing effects in the South African trade since we entered it in 1941. With the exception of two periods, 1953 and 1954, when Dreyfus entered the trade, and since December 1957 when Baron Iino entered the trade, the operators have customarily either followed conference rates or given the [788] other lines advance notice of intended rate changes.

• • •

[790] Q. How do the rates in the South and East African trade compare on a rate level basis with those prevailing in other trades where Lykes participates? A. Mr. Farrell has certainly stated the case correctly. The rates to South Africa have always been on a lower basis than they have in comparable trades, considering distances and so forth.

• • •

Alex C. Cocke—Recalled—Cross

[791] Q. Mr. Cocke, do you recall a visit by Mr. Overstreet of the Board in late 1954 or early 1955 in which this trade was mentioned to him? A. Yes, I recall a visit of Mr. Overstreet and Mr. O'Connor to New Orleans, and I was called in by Mr. Thurman to give my traffic views on the various trades.

Q. Mr. Thurman is President of Lykes? A. Mr. Thurman is President of Lykes, and the South and East African trade was very prominent in view of the fact it was about at the bottom of the totem pole as far as revenue and earnings were concerned and heavy expenses down there due to congestion at the various ports, and it still is at the bottom of the totem pole as far as our services are concerned.

Q. But this matter of the South and East African trade was discussed, or perhaps brought up by Mr. Overstreet and Mr. O'Connor. Is that correct? A. Well, I couldn't say it was brought up by them, but I know it was discussed, and they were very much interested in it.

. . .

[792] Q. They expressed their concern about it, didn't they? A. They definitely expressed their concern.

. . .

[817] Q. Mr. Cocke, you know when Dreyfus entered the South African trade? A. As I recall, in 1952.

Q. Can you state what the effect of its entrance into the trade was? A. Well, I think in the first—

Q. I'll rephrase that. It's too broad. What its effect was with respect to stabilizing or unstabilizing rates in the trade. A. It didn't have a very stabilizing effect.

Q. Did it have a very unstabilizing effect? A. Yes.

Q. For what reason? A. Because in many instances Dreyfus cut the existing rates.

Q. Had rates been stable before Dreyfus entered the trade? A. They had been very stable from 1946 to 1952.

Alex C. Cocke—Recalled—Cross

Q. Now, how was this stable rate system maintained?

A. It was maintained up to say 1946 and 1947 by the War Shipping Administration having its rates. It was maintained from 1947 to 1952 by Lines being in the conference out of the Gulf and cooperating and coordinating the rates with the lines out of the North Atlantic.

. . .

[819] Q. Well, but before the entry of Dreyfus you did have stable rates? A. We had very stable rates because there was no outside competition at that time except Safmarine, who followed the rates.

. . .

[821] Q. What happened in the years 1952, 1953 and 1954 with respect to stable rate structure with Dreyfus present in the picture? A. Well, there was lack of stability in many instances.

. . .

[822] Q. So that in 1954 Dreyfus appeared to be willing to participate in a very informal non-agreement method of accomplishing a stable rate structure? A. I would put it this way: When Dreyfus, who are well known and large shipowners, were suffering like the rest of us and felt that rates could be increased—because they were being increased practically in every service, not only from America but from Europe—that Dreyfus wanted an increase and did it on his own as we did.

We had no agreement to increase rates, but we did it as prudent business people, because none of us with increased costs I don't think could have continued very long with those rates. Something had to break.

. . .

[824] You have also indicated that when you entered the South African trade you were directed by certain persons at the Maritime Commission to put into effect the

Alex C. Cocke—Recalled—Cross

Robin-Farrell rates on competitive commodities. A. That's correct.

. . .

[825] Q. I believe you also indicated, Mr. Cocke, that at various times during the war Mr. McArt of the then War Shipping Administration I believe indicated to you what rate you should charge. What I would like to know is the extent of freedom, if any, the steamship lines, or your steamship line, possessed with regard to rates during the war period. A. The War Shipping Administration I would say, Mr. Hood, controlled the rates. Mr. McArt and Mr. McGuire would listen to us if we had any rate proposals, but in the final analysis it was their tariff and we had to heed to it.

Q. They, in effect, established the rates? Is that right? [826] A. That's right.

. . .

The Witness: Although we were urged—and I don't know whether you could call it instructed—to maintain the War Shipping Administration tariff pending adjustments.

. . .

[838] Q. Mr. Cocke, you have testified that opinions were divided and there was some confusion about what type of agreements or understandings should or should not be filed with the Maritime Commission and when? A. Well, it was felt by some that the type of agreement that was filed, 8054, was not necessary.

Q. Now, then, in that and other respects is it the general feeling of the trade that Section 15 as it's written is ambiguous in that and a number of other details? A. Quite so.

. . .

Arend Drost—Recalled—Cross

[841] AREND DROST was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Cross-examination by Mr. White:

Q. Mr. Drost, you testified previously in Washington, and I note at page 462 of the record of your testimony, a statement by you to the effect that your principals, Nedlloyd Lines, were establishing this service. You took the position that you should follow the Conference rates generally, with some exceptions. Have those instructions been carried out? A. Absolutely been carried out.

Q. At the same time when establishing this service, Mr. Drost, did your principals take any position with respect to agreements with other carriers? A. We received strict instructions not to enter into any agreements unless we were authorized to do so.

Q. Have those instructions been carried out? A. They have. We did not enter into agreement until we were authorized to join 8054 in '58, I think it was.

Q. Did you get special authority for that? A. We did.

Q. Mr. Drost, does that cover all possibilities of agreement with all the carriers in the trade from the beginning of [842] the year 1954 to date? A. Correct, sir.

Q. What is the reason for following the rates of other lines, if you know? A. Well, to begin with, the interest we have in the trade is only pertaining to the inward part and only to the northern part of the East Coast of Africa because, from the southern part, we are not competitive as to transit time. And it is natural if we quote higher rates, we will probably get very little business. And if we quoted lower rates, we would not get enough revenue to make the operation worthwhile.

Q. In other words, you consider yourself, to a certain extent, a minor participant in this trade? A. From what

Arend Drost—Recalled—Cross

I have heard in the testimony here, I think we are only a very small part in the trade and only as far as the inward is concerned from East Africa.

Q. You didn't want to get in the position of taking the lead? A. We would hardly be in a position to take the lead in such a small part.

Q. Is your position in respect of that practice any different than that which generally prevails among businessmen generally where small business is concerned? A. Well, it would be something like the tail wagging the dog, and I hardly think that works or would be in the interest [843] of the concern.

Q. Mr. Drost, there has been some special mention of an item called lepidolite. Do you know what that is? A. Well, when we entered the trade, I had never heard of the word lepidolite, and it was only later that I found out it was some kind of an ore, and our company showed very little interest in the commodity for operational reasons, and the only contact we had was to find out what rates were being quoted so that we could follow them in our tariff. But we never carried one pound of it as long as we've been in the trade.

Q. You have never carried a pound of lepidolite from the moment you have been in the trade down to the present moment, is that correct? A. No, sir, never carried it.

Q. Did you have any agreement or understanding or collaboration with any other carrier of any kind whatsoever in respect to lepidolite? A. No, sir, we did not.

Q. Would there be any possible reason for your having it? A. I don't think so because our principals showed no interest in it.

Mr. White: Mr. Examiner, there is just one other little detail that I would like to clear up at this time. Perhaps I can with the cooperation of Public Counsel here, as suggested yesterday, I believe.

Arend Drost—Recalled—Cross

[844] With respect to Exhibit No. 1, we have had a somewhat exaggerated statement of the Nedlloyd services resulting from including cargoes on other trade routes. I think we can safely say for the benefit of all concerned here that all that is involved in this trade with respect to the Nedlloyd sailings is one inbound sailing a month. Is that in accordance with your understanding?

Examiner Gray: If Mr. Drost can so testify, Mr. White.

Mr. White: Is that statement correct, Mr. Drost?

The Witness: That is correct, sir.

Mr. Hood: May I ask him a little more clarification on that.

Mr. White: Sure.

Mr. Hood: That is one inward to the Atlantic per month?

The Witness: Atlantic and/or the Gulf, sometimes the Gulf, per month. That has been ever since April 1954 on an average.

Mr. Hood: And that is the voyage that comes back through the Mediterranean?

The Witness: Correct, sir.

. . .

[845] *By Mr. White:*

Q. This tariff business, have you looked through your [846] tariff at my request to sort of check on the principal commodities that you carried? A. Yes. We made a sort of a study of it and found that out of a tariff which contains maybe 200 or more items, there are only about ten items which are of importance to us in the inward trade to the Atlantic.

Q. And of those ten items, have you had considerable rate variation on a number of them? A. About half of them, we at times had different quotations than the other lines.

G. P. Keers—Recalled—Cross

Q. That is, quotations different than the Robin or Farrell? A. That's correct.

Q. And in what direction were those divisions from their rates—upward or downward or both? A. Well, I would think somewhat higher in cases. We have carried, for instance, concentrates or ore concentrates at a higher rate, and we have carried it at lower rates. We have had sisal matting and binder twine at, I believe, lower rates. But they were on a different basis. And we carry animals on different conditions than are in the tariffs of the other lines. And we have had occasion or, for instance, ferrochrome where we had a lower rate than they had.

Q. In those instances where you gave the equivalent, you followed your own rule, is that it? [847] A. We are in consultation with our principals were we allowed to deviate from the principle of following the other lines' rates.

. . .

G. P. KEERS was recalled as a witness and having been previously sworn, was examined and testified further as follows:

Cross-examination by Mr. White:

Q. Mr. Keers, you have testified previously in Washington, did you not? A. Yes, sir.

Q. You sat through the Washington hearings? A. Yes, sir.

Q. And you sat through these hearings? A. That's correct.

[848] Q. You read the record at my request? A. I looked through the record of the testimony.

Q. You looked at the exhibits, too? A. Exhibits, too.

Q. When you testified previously, you indicated that you had arrived at no agreements with other carriers whatsoever. Is that correct? A. That is correct.

G. P. Keers—Recalled—Cross

Q. Except the 8054? A. Up to the time of 8054.

Q. After hearing all the other testimony and seeing all these documents and seeing the testimony again, is that still your testimony? A. That is correct, sir.

Q. Mr. Keers, in your earlier testimony, you indicated that you had rather broad experience around the world. Is that correct? A. I think so.

Q. And you are in the service of the Nedlloyd Lines or the participating members of the Nedlloyd? A. Yes, sir.

Q. The two companies which make up Nedlloyd Lines are what? A. The Nederland Line of Amsterdam and the Royal Lloyd of Rotterdam, who run a major part of the service from Europe [849] and other parts of the world and have some of their services to and from the United States.

Q. Are both of those companies sizable Dutch shipping companies? A. Their direct fleet directly operated by them is about 80 ships, and I would think another fifty ships indirectly with partnership with others.

Q. Do they serve various services all around the world? A. Yes, sir.

Q. And you have participated in the activities of quite a number of those services? A. Yes, sir.

Q. Mr. Keers, this South African service with which we are concerned here, might that be described as a fairly minor service of the Nedlloyd interests? A. That is correct, sir. It is a minor interest in the total.

Q. What would be your statement with respect to the degree of competition in the South African service with which we are concerned here as compared with other services in which you have participated and had an interest? A. I think it is a highly competitive service.

Q. And that competition has continued at all times during your participation, has it, sir? A. Yes, sir.

[850] Q. And it continues today? A. It continues today.

. . .

G. P. Keers—Recalled—Cross

[860] Examiner Gray: Do the respondents have any witnesses or any further affirmative offerings?

[861] Mr. Ira Ewers: Mooremack has none, Mr. Examiner.

Mr. Maddy: Farrell Lines has nothing.

Mr. Longcope: Dreyfus has nothing.

Mr. Douglas: Mr. Examiner, before we argue about admissibility of documents, if we have finished with witnesses, I do want to mark some documents which came from Public Counsel and were apparently obtained from Dreyfus' files. I am not going to offer these in evidence unless by Public Counsel, who apparently intended to offer Dreyfus' documents, is successful. But I would like to mark them just to be prepared against that eventuality. Would you like me to do it now?

. . .

[862] Mr. Poor: Mr. Examiner, we had considered the possibility of asking Mr. McGrath some questions on cross examination. We don't want to prolong the hearings any more than we have to. Possibly Mr. Hood would concede that if Mr. McGrath were recalled and asked on cross-examination whether Mr. Buser had any authority to bind Safmarine to a rate up to May 31, 1959, Mr. McGrath would testify that Mr. Buser had no such authority.

I think Mr. McGrath has substantially so testified already. Perhaps Mr. Hood would concede that.

Mr. Hood: Well, Mr. Poor, if Mr. McGrath has already testified to that effect it would seem unnecessary to have him say the same words again.

Mr. Poor: I think he has testified. Well, Mr. Buser testified—

Mr. Hood: Mr. Buser, as I recall, did testify that, "I had very little authority indeed," or words to that effect.

Colloquy

Mr. Poor: I don't think Mr. McGrath said so definitely, but the tenor of his testimony was that he had the authority and nobody else. I don't know that he was quite as definite as that.

Mr. Hood: I still perhaps am a little in the dark as to what you are requesting of me at this moment, sir.

Mr. Poor: I'm asking you to stipulate that if Mr. [863] McGrath were to testify on cross-examination and were to be asked if Mr. Buser had authority to agree to a rate binding on SAFmarine prior to May 31, 1959, Mr. McGrath would testify that Mr. Buser has no such authority.

Mr. Hood: Mr. Poor, I'd be willing to stipulate that Mr. McGrath would concur in the testimony we had from Mr. Buser on this point. Is that satisfactory, sir?

Mr. Poor: That would be satisfactory.

. . .

PROCEEDINGS

[874] Examiner Gray: Are you ready now to offer your exhibits?

Mr. Hood: Yes, sir.

. . .

[875] I will turn now to offering the documents themselves, sir, and I presume that there's no choice but to go through them one by one.

Examiner Gray: I think that's the only way.

. . .

[985] Mr. Hood: I offer Exhibit 116, Mr. Examiner, a piece of correspondence written by Mr. McGrath, States Marine, indicating the state of the relations between the lines at this period.

Mr. Capone: Well, now, I have several objections, Mr. Examiner, but I don't quite—I respectfully suggest that

Colloquy

the phrase "indicating the state of the relations between the lines" is much too ambiguous to determine what particular sentences of paragraphs in this letter he is referring to and for what purpose and what lines.

Mr. Hood: Mr. Examiner, in the third paragraph of the letter there is an indication that there was communication between South African Marine or States Marine on behalf of South African Marine and Robin and Farrell relative to the fixing of the rate. Again, the date of the letter being April 6, 1954. The purpose of it is to give some background on early cooperation.

Mr. Maddy: Mr. Examiner, might I point out that this document is not admissible on any ground? It's not the admission of any party here in this proceeding.

Apparently, this is a letter by Mr. McGrath, who at that time I understood worked for States Marine, not a party in this proceeding.

Mr. Hood: At that time States Marine being the [986] agent for South African Marine I believe, sir.

Mr. Bauer: Mr. Examiner, SAFmarine objects to this exhibit also, and I'd like to point out on page 432 of the testimony the question was asked:

"What was the result of this consultation?"

The answer given by Mr. McGrath was: "In this particular case there was no change. Nothing took place."

That testimony makes other statements in paragraph 3 of the exhibit irrelevant and immaterial to anything before the Examiner in this proceeding, and I might also point out that the specification of charges against Safmarine begins with an alleged agreement in December of 1954, and this letter is dated in April of 1954.

Public Counsel has indicated that this would be background material, but on prior occasions this afternoon I believe we have stricken exhibits which were merely background material.

Colloquy

Mr. Hood: Mr. Examiner, the fact that an agreement may not have been reached at this time does not mean that the negotiations at this time are totally immaterial to whether there were later agreements.

Mr. Capone: I object to the word "negotiations." There is no such indication. To me that word has a specific connotation.

Examiner Gray: Exhibit 116 is rejected.

[987] (The document above referred to, heretofore marked for identification as Exhibit 116, was rejected.

Mr. Hood: Mr. Examiner, I would offer Exhibits 117 and 118, both being letters signed by Mr. McGrath, at that time States Marine.

Mr. Poor: Mr. Hood, they deal with different subjects.

Mr. Hood: Very well. We'll take 117 first then, sir.

Mr. Capone: Mr. Hood, may I ask what part of this document and for what purpose and against whom you are offering it?

Mr. Hood: The document in the second paragraph would indicate cooperation between States Marine and Lykes.

Mr. Capone: You are not offering it for anything in the first paragraph? Is that correct?

Mr. Hood: One moment, sir. I would not offer it for anything in the first paragraph relating to Farrell or Robin.

Mr. Capone: As far as if it's possible that that second paragraph is to be construed by Public Counsel by inference as conveying a statement of fact that there existed a gentlemen's agreement between Robin and Farrell of which Lykes was a member, we object, of course, because it's [988] hearsay.

Mr. Maddy: Mr. Examiner, also this letter has the same vice as I pointed out previously in connection with the previous document, in that if this is an admission it would

Colloquy

be only an admission of a non-party, States Marine merely being agent of South African Marine at that time.

Examiner Gray: I will receive Exhibit 117.

(The document above referred to, heretofore marked for identification as Exhibit 117, was received in evidence.)

Mr. Hood: I offer Exhibit 118, being a letter by Mr. McGrath, indicating an intent at this time to agree with Robin and Farrell or an attempt to agree with Robin and Farrell on the rate.

Mr. Bauer: Mr. Examiner, this exhibit is in the same category as Exhibit 116 which you rejected. On page 439 of the testimony I'd like to point out that Mr. McGrath was asked:

"What was the result of this meeting insofar as any equitable freight rate was concerned?"

And on page 440 he answered: "There was no result."

The next question was: "No rate was decided upon?"

The answer was: "No rate was decided upon."

I would object to this as irrelevant to any charge [989] before the Examiner.

Mr. Capone: Also this is an intracompany communication not admissible against Farrell.

[990] Mr. Hood: Mr. Examiner, the letter indicates the then intention of the respondent, South African Marine, regarding agreeing with other lines. The fact that in this instance no agreement was reached does not destroy the value of the information.

Mr. Ira Ewers: I question the document.

Examiner Gray: I think it should be rejected, and it is rejected.

(The document above referred to, heretofore marked for identification as Exhibit 118, was rejected.)

Mr. Hood: We will not offer 119.

Mr. Ira Ewers: You will not offer 119?

Mr. Hood: That is correct, sir.

(The document above referred to, heretofore marked for identification as Exhibit 119, was withdrawn.)

Exhibit 5**MEMORANDUM**

DATE February 11, 1954

FROM MR. S. J. MADDOCK

TO Charles Hopper.

SUBJECT

Fred Unver called today and advised they have a letter from Clarence Provost of the International General Electric Co., asking for rates on three Diesel locomotives for shipment to Durban. Fred Unver understood Clarence Provost to say that a copy was sent to us. I have not seen it but would like to have a copy of this rate request.

You can tell Clarence Provost that it is customary procedure with most shippers to send us a copy of their request for rate reductions to the Conference and that we and Farrells usually discuss such rate requests before anything is decided and then we always quote the same rates.

S. J. MADDOCK

S. J. Maddock.

CC Mr. Pat Gabriel,
Mr. Gus Dettling.

SJM*IS

Exhibit 6

ROBIN LINE
SEAS SHIPPING Co., Inc.
39 CORTLANDT STREET
NEW YORK 7, N. Y.

GC 77-923

CABLE MESSAGE SENT

PORT

DATE NOVEMBER 2, 1955.

LT

COTTSROBIN

LONDON (ENGLAND)

102 HOWELL REFERENCE CONVERSATION ASPHALT
 BITUMEN RATES LYKES FARRELL SAFMARINE DREY-
 FUS OURSELVES HAVE AGREED FOLLOWING NEW
 RATES FROM TRINIDAD APPLICABLE BOTH DIRECT
 OR TRANSHIPMENT EXCEPT AS NOTED CAPETOWN
 PORTELIZABETH EASTLONDON DURBAN LOMARQUES
 110 SHILLINGS WALVISBAY DIRECT 110 TRANSHIP 145
 LUDERITZ 172 MOSSELBAY 128 BEIRA 130 MOMBASA
 DARESSALAAM TANGA ZANZIBAR 140 STOP NO
 CHANGE PRESENT RATES MADAGASCAR MAURITIUS
 REUNION COMORES STOP NO RATES AGREED FOR
 PEA OR BEA OUTPORTS BUT WILL ACCEPT APPRO-
 PRIATE RATES FIXED BY BRITISH CONFERENCE
 LINES STOP EQUIVALENT RATES DOLLARS CENTS
 WILL APPLY FROM US ATLANTIC AND GULF PORTS
 STOP ALL NEW RATES WOULD BE EFFECTIVE FROM
 JANUARY FIRST THROUGH JUNE THIRTIETH 1956
 STOP REQUEST YOU CONFER LONDON REPRESENTA-
 TIVES OTHER LINES NAMED AND AGREE JOINT AP-
 PROACH BRITISH CONFERENCE LINES REQUESTING
 THEIR ADOPTION FOREGOING STERLING RATES AND
 THEIR VIEWS APPROPRIATE RATES PEA AND BEA
 OUTPORTS STOP ADVISE SOONEST STOP AS INFOR-
 MATION NO DECISION PETPRODUCTS RATES AS YET

MCGUIRE

CHMC:VMR

3:30 PM

CABLE Co. RCA

VESSEL

COPIES To:

Voy. #

WOC CCP LFF

CHM FRS HKF

Exhibit 9

June 6, 1956.

**MEMORANDUM RE TELEPHONE CONVERSATION WITH
MR. A. C. COCKE, V. P., LYKES BROS SS Co, INC.,
NEW ORLEANS**

• • •

As requested by Mr. Farrell and Mr. Mercer during our general discussion this morning, I called Alec Cocke of Lykes Bros. on the telephone this afternoon and outlined to him the views of Farrells, Safmarine and ourselves with respect to specific increases on automobiles and agriculturals and on container board/Kraft paper as well as the suggested 5% general rate increase after adjustment of the aforementioned specific rates. As to petroleum products I told him this was a matter primarily for handling by his company on the one hand and Safmarine on the other and I did not propose to discuss this particular matter with him.

Mr. Cocke first stated that they in the Gulf do not consider that automobiles and agriculturals must necessarily be given identical rate treatment and they would in fact under certain circumstances treat them differently. However, he then confirmed the information that he had previously conveyed to me about ten days ago through his New York Office to the effect that he would be willing to support a rate increase of not in excess of 10% on agriculturals provided all other lines would advocate and support such increase.

Upon being pressed by me for a definite statement of his position on the several proposed rate increases, he advised that he would support (provided all other lines did so as well) the upward adjustment proposed for automobiles and agriculturals and for container board/Kraft paper and would also agree to the proposed 5% general rate increase

Exhibit 14

after adjustment of those individual items. However, he stated with particular respect to agriculturals that his agreement was contingent upon there being no development of serious opposition on the part of the agricultural shippers. I told him that I would convey this to the other lines as being his position and would advise him as to developments.

I also brought up with Mr. Cocke the matter of the depressed rate on steel rails, spikes, bolts, etc. He agreed that the rate is quite unrealistic but is opposed to restoring it to the former basis of \$19.00 which he feels is on the high side. He agreed to an increase to \$15.00 on these items, otherwise would prefer that the rate be thrown "open".

C. H. McGuire.

Copy to
Mr. W. O. Cook

*Exhibit 14***MEMORANDUM**

Date June 27, 1956
From J. M. McAvoy
To Mr. C. H. McGuire
Subject

In accordance with decision taken at meeting of Friday, June 22nd the undersigned met on June 25th and 26th at the office of the Conference with representatives from Farrell Line (F. Unver), SAF Marine (F. De Marco), Lykes (P. O'Kelly) and Dreyfus (G. Connelly) to set up uniform and accurate new rates based upon an anticipated 5% increase over rates presently in effect. Copy of the new schedule is attached hereto.

Exhibit 14

Additionally it was confirmed:

1. No rate increases would apply on:
 - (a) Asphalt/Asphaltum.
 - (b) Petroleum products, including lubricating oil in bulk.
 - (c) Cotton and Cotton Linters (other than that now published by Gulf operators, effective July 1, 1956 through June 30, 1957.
 - (d) Rice.
 - (e) Synthetic Rubber. This commodity is being investigated by Lykes and Dreyfus and should it not be increased Farrell Lines will insist upon the exemption from rate increase of all tire materials.
 - (f) Tallow in Bulk.
2. Accessorial charges, minimum bill of lading charge, heavy lift, extra length, port differentials etc. to remain unchanged.
3. On Rails, railroad tracks and rail accessories the rate of \$12.00 (Capetown/Lourenco Marques range) will be increased to \$15.00 and then subject to the 5% increase, totaling \$15.75. The Beira differential of .50 to be maintained making that rate \$16.25.
4. Container board, also Kraft Wrapping paper and Kraft Sacking paper to be amended from \$27.00 to \$28.25 then subject 5% increase, resulting in total rate \$29.75.
5. The rate on Woodpulp, originally excepted from increase by Robin, will be subject to increase of 5%.

Exhibit 14

6. The increased hazardous cargo, N.O.S. rate will become \$108.50 per ton (double the increased General Cargo rate of \$54.25) which deviates slightly from strict adherence to the 5% increase. Where specific rates of \$103.50 are now published, such rates will also be increased to \$108.50. This arrangement allows for all lines to quote uniform rates.

7. The application of the 5% increase was made on the formula of dropping to the next lowest .25 on increases of .12 and under, and conversely increasing to the next highest quarter on increases of more than .12, with present published differentials over Capetown basis maintained. The retention of present differentials likewise embraces those reflected for some specific commodities e.g. human ashes, ducks, etc.

8. Robin and Dreyfus confirmed to the others present that the 5% increase would be applied to Madagascar rates on the same basis as that for Capetown (see 7 above.)

9. Insulators, glass or procelain, would receive the 5% increase and same would be reflected in the tariff. In the event that award is made to the Ohio Brass Company for supply to Kariba Dam and Warmbad Village Council projects the offered rate of \$30.00 Capetown basis, now published in rate memorandum only would apply, subject to increase.

10. Lykes asked concurrence that when made, the announcement of rate increase should be phrased so as to avoid reference to specific percentage, and it was acknowledged that the meeting of Friday June 22nd discussed this

Exhibit 15

point, and general argument was held that this type of announcement would be made.

Harold K. Flad
H. K. FLAD

Joseph M. McAvoy
J. M. McAvoy

JMMcA:vp
cc: Mr. F.R.Smith
Mr. H.K.Flاد
Mr. J.J.Riordan
Mr. J.M.McAvoy
Encl.

Exhibit 15**MEMORANDUM**

Date November 25, 1957
From MR. CHARLES H. MCGUIRE
To Mr. J. E. Fee
Subject COPPER PLATES—1958

In company with John Gorman of Farrell Lines I met this afternoon with Charles McLagan of Turnbull Gibson & Company (London) and Frank Marick and Al Shields of American Metal Company at the latter's office to resume our negotiations on Copper rates for the coming year.

Mr. Gorman and I proposed a rate of \$17.00 per weight ton to cover the major Copper items which now carry a \$20.00 rate, such lower rate to apply during the full year of 1958 in accordance with their desires. This offer they

Exhibit 15

would not accept, stating it was too high in relation to other offers they had in hand and because it was appreciably out of line with what they considered a reasonable differential over the U.K./Continent rate which was recently negotiated at 97/6 (\$13.65) for the full year ahead. After some discussion we countered with a rate of \$16.50 valid for the full year of 1958 but offered to give them a \$16.00 rate valid only for the first six months of next year if they were willing to agree on this shorter period, which we strongly preferred.

Mr. McLagan on behalf of the Anglo-American Group and Mr. Marick and Mr. Shields on behalf of the Rhodesia Selection Trust and C'Keip accepted the rate of \$16.00 to cover the movements during the first six months of 1958, with the understanding that we will negotiate and agree upon the rate applicable for the last half of that year not later than April 30, 1958. In this latter connection Mr. McLagan stated on behalf of his principals that he may find it necessary to ask us to agree on the last half 1958 rate somewhat earlier than April 30th, because of the possible requirement of his people in connection with forward contracts for the refining of Blister Copper, to which we advised him that we would at any reasonable date in the Springtime prior to April 30th be willing to discuss and agree upon the last half of 1958 rate.

It is to be understood that we do not have a guarantee of exclusive patronage from either Turnbull Gibson & Company or American Metals Company on behalf of their principals, although Mr. Gorman and myself each made clear to them that we hope and expect to receive the major portion of their business as has been the case heretofore.

With respect to our competition I had the assurance before going into this meeting from Mr. Hans Severiens of Nedlloyd that his Company would agree and abide by any rate that Gorman and I negotiated with the Copper

Exhibit 18

people and I have advised him as to the outcome of our meeting. Another line will definitely be favored with at least a small part of this business because of its asserted willingness to handle the cargo at lower rates than we had offered, and although this line was not specifically identified, it seems quite clear that the Company involved is the recently established Central Gulf Steamship Corporation.

Please do not cable to London or to Africa respecting these new rates effective January 1st until I advise you it is in order to do so since Mr. Gorman and myself agreed to wait in this regard until Mr. McLagan had the first opportunity to notify his principals in London and in Africa as to the agreement arrived at.

Copies to:

Mr. W. T. Moore
Mr. G. L. Holt
Mr. J. J. Riordan
Mr. J. W. Howell

C. H. McGUIRE.

Exhibit 18

September 1, 1954.

Confidential

Mr. K. A. Adcock, Director,
Mitchell Cotts & Co. (E.A.) Ltd,
Mombasa, British East Africa.

Dear Mr. Adcock:

We have for acknowledgment your confidential letter 27th August, advising that Mr. Gerry Smith of Lykes Bros. had called on you in Mombasa and informed you that he was worried at the activities of Dalgety & Company on behalf of the Louis Dreyfus Line. We can understand the suspicions of Mr. Freddy Hills of Leslie & Anderson who represent the Lykes Lines at Dar-es-Salaam. This same

Exhibit 18

propaganda was spread around New York about a month ago and if it were not for the fact that the Robin Line had just made an agreement with Dreyfus to work together on rates, it is probable that Farrells, Robin, and the others would have reduced the rates unnecessarily. I can tell you in confidence that Wigglesworth initiated this matter; they asked the Dreyfus agents if they would give them a \$16.00 rate on a quantity of 4,000 tons of sisal. Dreyfus' agents confirmed that on a firm offer of 4,000 tons they would agree to the \$16.00 rate. Actually, Wigglesworth, or no other sisal shipper, is prepared to book 4,000 tons sisal at the present time. However, Wigglesworth lost a few small orders totalling a few hundred tons to Dalgety & Company and immediately they jumped at the conclusion that it was because of the freight rate.

We have been intending to write to you and London about our very recent negotiations with the Louis Dreyfus Line and their New York agents, Ponchelet & Company. There has been some change in the organization of Ponchelet & Company recently; Mr. Ponchelet Senior has retired and his son Jack Ponchelet is in charge. There is a man working for them and in charge of traffic, by the name of John Boyes, who is acquainted with our Mr. Frank Smith. It happened that Mr. Boyes was on a trip to Paris recently and saw for himself how certain French shippers had used Dreyfus against the Robin Line to obtain reduced rates. These shippers would tell Dreyfus that they needed a reduction on a particular commodity and they had been assured by the Robin Line of the reduction; then when Dreyfus agreed to meet the Robin Line reduced rate, they would come to the Robin Line and tell us that they had an offer of a reduced rate from Dreyfus and they would have to favor Dreyfus with their business in the future unless the Robin Line met the competition. We had suspected this on numerous occasions but Mr. Boyes was able to prove it to the Dreyfus officials in Paris to their satisfaction. When Mr. Boyes returned to New York, he asked to see me, and Mr.

Exhibit 18

Frank Smith and I invited him to lunch. I feel convinced that Mr. John Boyes is a man of honor and I do not believe that he would deliberately mislead us. Mr. Boyes told us in confidence that he is convinced, and he told Mr. Pierre Dreyfus and his associates in the Dreyfus Line, that there is nothing to be gained by Dreyfus cutting rates because the Robin Line will meet all reductions. He told us that Mr. Pierre Dreyfus complained that the Robin Line were most responsible for these reductions and Mr. Boyes was able to tell him of what he had developed on the shippers working Dreyfus against Robin to get these lower rates. Mr. Pierre Dreyfus asked what would be the solution and Mr. Boyes told him he would see me on his return to New York and try to make a working arrangement with us.

I told Mr. Boyes that we would be most happy to work with the Dreyfus Line on rates if we could depend upon them but that our experience in the past had not assured us on this matter. I told Mr. Boyes that it would probably only work if Paris would agree not to reduce any rate without first submitting it to Mr. Boyes to discuss it with us. I explained that our agents are not permitted to quote reduced rates without our authority and while we have absolute confidence in Mr. John Boyes, we are not so sure when we work with others. Mr. Boyes offered to submit the proposal to his principals in Paris and endeavor to obtain their concurrence. Within a few days time, Mr. Jack Ponchelet telephoned that Mr. Pierre Louis Moine, one of the principal Directors of Dreyfus Line, Paris, was in New York, and would like to see me. When Messrs. Moine and Jack Ponchelet called, they told me that Mr. John Boyes had told them of our proposal and Mr. Moine was flying to Paris with it and would endeavor to have Paris concur. We received a message a few days later from Mr. Ponchelet that Mr. Moine had confirmed that the Dreyfus Line in Paris had agreed to this arrangement. This is now in effect and before we reduce any rate on any commodity being shipped to or from Madagascar or South and East

Exhibit 18

Africa, we call Mr. John Boyes and discuss it with him, just as we have been doing with Farrells and Lykes. Mr. Boyes now telephones us when he has any proposal for reducing rates and we exchange information as to whether or not it is advisable to grant the reductions.

Farrell and Lykes have been informed by me of this working arrangement that we have with Dreyfus and they are very pleased about it. Farrells and Lykes always consult us before reducing rates and we now discuss the matter with Dreyfus before giving any decision to Farrells or Lykes.

You will understand that there is no commitment on the part of Dreyfus or ourselves to agree on any specific rate, it is simply an arrangement of discussing the matter with each other before making any reduction. We are free to talk very honestly with each other and when we receive advice through an agent that Dreyfus has quoted or indicated a reduced rate, we are able to put it up to Dreyfus and have them deny or confirm it. They are in the same position in asking us to deny or confirm any reports they receive.

We have received absolute assurance from Mr. Boyes that Dreyfus & Company have not booked any sisal with Dalgety & Co. or any other shipper at rates lower than the tariff rates and that there is absolutely no truth to the report that they are giving Dalgety & Co. or any other shipper rebates. They further told us that they have no intention of reducing the present tariff rate on sisal.

We were interested in your obtaining for us a copy of the cargo engagements for the SS "La Cordillera" to be loaded at Dar-es-Salaam on August 25th, but on perusing this list it appears that Belbase are the only substantial shipper. It is true that they have 605 bales sisal, 75 tons weight, booked with them by AGAC and 15 bales of goat-skins, 6 tons weight, booked by CEATC, but all of the other cargo in which we are interested was booked by Belbase. I do not think we have any good reason to doubt the statement of Mr. Leo Van Gorp that any shipments he booked

Exhibit 18

paid the same rate as charged by the regular line. There has been great congestion at Dar-es-Salaam and that might have been his reason for using the Dreyfus sailing. Of course, there might have been some other reason but we are convinced that Dreyfus did not get this business by quoting lower rates.

There is danger in Gerry Smith and yourself taking such a strong position with these shippers because you may convince them that Louis Dreyfus are granting some shippers lower rates and then you give them the idea that they should look for reduced rates. Dreyfus are committed to us not to reduce rates without discussing it first with us but they are perfectly free to reduce rates by telling us in advance that they propose to do it. I can understand your feeling and very definite suspicions which are justified by the actions of Dreyfus in the past. However, now that we have this working arrangement with Dreyfus, I think we should all wait until it is proven to us that Dreyfus are actually quoting lower rates.

Very truly yours,

Vice President.
(S. J. MADDOCK)

Copies to:

Mr. John W. Howell,
London

Mr. W. J. MacCormac,
Cape Town.

Mr. W. L. Deeble,
Johannesburg.

SH*IS

APPEARED IN LONGHAND ON TOP OF PAGE ONE
OF ORIGINAL

Mr. Pierre Louis Moine is very anxious that you and I meet Pierre Dreyfus and their other Directors when we are in Paris. I promised we would hold open one day to lunch with them. It looks like we are finally on a sound basis to work with them.

SJM

Exhibit 34

U. S. A./SOUTH AFRICA CONFERENCE

TO ALL LINES:

December 6, 1957

ASPHALT OR ASPHALTUM

Further to my Circular of November 21st on the above subject please note that it has now been proposed that the present rates on Asphalt or Asphaltum be made effective through June 30, 1958.

Please advise if you concur.

J. M. PHILLIPS,
Secretary.

APPEARED IN LONGHAND ON ORIGINAL:
"All lines agreed"

Exhibit 35

INTER-OFFICE CORRESPONDENCE

September 11th, 1957

FROM: HAROLD K. FLAD

TO: MR. J. J. RIORDAN

SUBJECT: RATE MEETING—SEPTEMBER 10, 1957

Meeting convened at 2:30 P. M. at the USA/South Africa Conference Room, 26 Beaver Street.

Attended by:

J. Phillips—Chairman U.S.A./South Africa Conf.
J. Unver—Farrell Lines
V. O'Neill—Farrell Lines
L. Buser—SAF Marine
P. O'Kelly—Lykes Brothers
J. Kelly—Robin/Moore-McCormack
H. Flad—Robin/Moore-McCormack

Exhibit 35

The following matters were discussed:

(1) BULK OIL AGREEMENT

Standard-Vacuum Oil Company letter of August 14th (copy attached) relative Shortage and/or Damage clause in Bulk Agreements Clause #10 was reviewed. Tabled for further study.

(2) KRAFT WASTE PAPER

Major Forwarding request that rate be established for Waste Kraft Paper Clippings to that applicable for Waste Paper, however, with increase from present 60 cu. ft. to 80/100 cu. ft. Request denied.

(3) HARDWOOD FLOORING

Kerr Steamship Ltd., Montreal, Quebec letter of September 6th (copy attached) requesting adjustment to our Hardwood Flooring rate. Matter tabled for further study.

(4) CLAY

Heiwite, Super X, Kaolin, China. These items of clay were reviewed as a request was received to assess rate applicable to CHINA and KAOLIN to HEIWITE and SUPER X. Request denied.

(5) FABRICATION (*In connection with Iron and Steel Items*)

This item to be clarified as to FABRICATION. Circular to be distributed by J. Phillips with suggested clarification.

(6) COPPER ITEMS

American Metal Company, Ltd., letter of September 9th (copy attached) requesting rates on BARS, BILLETS, CATHODES, INGOTS, PIGS, SLABS be reduced to about \$33.00 W/M to Durban. Matter tabled for further study.

*Exhibit 35***(7) DIACETONE ALCOHOL**

Request by Lykes to add this item to PETROLEUM PRODUCTS. All lines agreeable. Effective September 11th, 1957.

(8) SEED STRIPPERS

Request by Robin to add this item to MACHINES viz.; at \$35.25 W/M Capetown basis. All lines agreeable. Effective September 11th, 1957.

(9) GREASE GUNS

To avoid any misapplication of rate it was decided to add to the tariff, GREASE GUNS, POWER OPERATED—apply Machinery rate. Also GREASE GUNS which now appear in the tariff be restricted as follows—GREASE GUNS, Not power operated. This to be effective September 10th, 1957.

(10) RAYON PIECE GOODS

Request made by George Ager that rates applicable to Cotton Piece Goods be applicable to Rayon Piece Goods. Information supplied by George Ager incomplete therefore, matter tabled for later review. Unless George Ager can supply worthwhile information his request will be denied.

(11) FERTILIZER IN BULK—DISCHARGE STEVEDORE

The question of who to be discharge stevedore has apparently been discussed with the lines. Lykes Brothers suggest the following clause be inserted in Booking contract and bill of lading.

“STEVEDORE AT PORT OF DISCHARGE TO BE NOMINATED BY THE CARRIER SUBJECT TO A MAXIMUM STEVEDORING CHARGE OF 1s3d per Gross Ton.”

Tabled by the lines for further study.

Exhibit 36

Meeting adjourned at 4:30 P. M.

Next scheduled rate meeting to be held at the USA/
South Africa Conference Room, Monday, September 16th,
1957 at 2:30 P. M., at which time the first item on the
docket will be POWDERED MILK.

HAROLD K. FLAD.
Harold K. Flad

HKF/cs

Attachment

cc: Mr. C. H. McGuire
Mr. J. M. McAvoy
Mr. M. J. Kelly

Exhibit 36

INTER-OFFICE CORRESPONDENCE

From: HAROLD K. FLAD

To: MR. J. J. RIORDAN

Subject: RATE MEETING—SEPTEMBER 16, 1957

Meeting convened at 2:30 p. m. at the USA/South
Africa Conference Room, 26 Beaver Street.

Attended by:

J. Phillips—Chairman U. S. A./South Africa Conf.
F. Unver—Farrell Lines
V. O'Neill—Farrell Lines
L. Buser—SAF Marine
P. O'Kelly—Lykes Brothers
J. McAvoy—Robin/Moore-McCormack
J. Kelly—Robin/Moore-McCormack
H. Flad—Robin/Moore-McCormack

Exhibit 36

The following matters were discussed:

(1) **BULK OIL AGREEMENT**

Farrell and SAF Marine agree to revision of clause #10—Robin and Lykes desire to give it further study.

(2) **KRAFT WASTE PAPER**

Although it was agreed at the meeting held September 10, that Major Forwarding request for rate establishment be denied, no line informed shipper; therefore it was further agreed that shipper be informed Tuesday a. m., Sept. 17.

(3) **HARDWOOD FLOORING**

Held over for further study.

(4) **FABRICATION** (In connection with Iron & Steel Items)

The suggested clarification circular as noted in rate meeting report of September 11 delayed. Will be forthcoming.

(5) **COPPER ITEMS**

Result of review as follows; tariff to be amended accordingly (effective 9/17/57).

Group #3—Bars, Billets, Cathodes, Ingots, Pigs, Slabs, unpacked \$33.00 CT Basis—\$37.00 BEA—\$52.75 Madagascar etc.

Group #1—Bars, packed, in boxes or cases \$59.75 CT Basis—\$63.75 BEA—\$71.75 Madagascar Delete coils from Group #1.

Group #4—Scrap (packed) \$52.50—\$56.50—\$64.50.

*Exhibit 36***(6) RAYON PIECE GOODS**

Request by George Ager for rate reduction denied. Lines to notify shipper Tuesday a. m. September 17, 1957.

(7) FERTILIZER IN BULK (DISCHARGE STEVEDORE)

Clause as noted in Rate meeting report of September 11 agreeable to Lykes and Farrell. Robin & SAF Marine to give further study. The rate as mentioned of 1s3d corrected to 3s3d.

(8) INTERNAL COMBUSTION ENGINE

Rate applicable to this commodity to be reviewed. Farrell Lines request.

(9) MOTOR GRADERS (Tender for 66)

Request by Wedemann & Godnkecht on behalf of Caterpillar Tractor Co. to permit present rate applicable be effective through March 31, 1958—(Port Elizabeth only). All lines agreeable, however tariff not to be amended until shipments move.

(10) EXCAVATORS

Request by Cosmos Shipping on behalf of Harnischfeger that order for (20) Unboxed Excavators destined to Cape Town-East London and Durban be permitted rate applicable to BOXED. Request denied. Shipper to be notified Tuesday a. m., September 17, 1957.

(11) VIRGINIA APATITE

Add to Bulk Fertilizer items effective September 16, 1957—Rate OPEN.

*Exhibit 36***(12) MIXERS, CONCRETE**

Request by Farrell Lines to qualify rate same basis as Compressors. Also add item: MIXERS, CONCRETE, N. O. S. apply Machinery N. O. S. rate. No decision reached, matter held over for later discussion.

(13) POWDERED MILK

This item has been under review by all the lines and after a full discussion it was decided to amend tariff as follows:

MILK, POWDERED (including Dietetic)	\$42.25
FOOD, INFANT DIETETIC, N.O.S.	\$59.75
(effective Sept. 17, 1957)	

Shippers to be notified accordingly on Tuesday, September 17, 1957.

Meeting adjourned at 4:45 p. m. No date set for next meeting.

HAROLD K. FLAD.
Harold K. Flad

cc:

Mr. C. H. McGuire
Mr. J. M. McAvoy
Mr. J. Kelly

HKF/mm

Exhibit 43

February 11, 1954

MEMORANDUM

**To: Mr. W. C. Shields
Mr. F. J. Unver**

From: Mr. James A. Farrell, Jr.

**LUBRICATING OIL (Packaged) SOUTH AND EAST AFRICA
Account—Standard Vacuum Oil Co.**

You will recall that on my return to the United States, December 1, 1953, you both brought to my attention the fact that Mr. Ray Vaughn, on behalf of Standard Vacuum Oil Company, had been in touch with the Oil Committee of the U. S. A./South and East Africa Conference and pointed out that the Lines could expect a continued decline in packaged shipments of lubricating products from Philadelphia and New York, because of:

1. the completion of the new refinery near Southampton, England,
2. the problem of dollar exchange, and
3. the intercommonwealth decisions taken at the Economic Conference at Sydney, Australia in 1953, and prior thereto.

My first reaction, of which I then advised you, was to the effect that I saw no purpose in reducing the rate because I doubted if any reasonable reduction would have any beneficial result, in view of the existing low rate from U. K. ports to South and East Africa, which in view of American cargo handling costs, we could not match and because I was aware of the tremendous pressures on the standard "companies" to supply their Vacuum Oil Company South Africa requirements from either Southampton or Durban as a

Exhibit 43

matter of commonwealth policy. Accordingly, Mr. Vaughn's suggestion was not further considered by me until late in January. You will recall that late in January you supplied me with statistics of lubricating oil shipments from Philadelphia and New York by all shippers for 1953, indicating a very marked decline. In view of these statistics, I renewed conversations with Mr. Vaughn and at luncheon with him February 3, he advised me that after consulting with the officials of his company in New York and in the U. K., it appeared that most of his company's requirements in South and East Africa amounting to perhaps 50%, would in view of the circumstances outlined above, have to be shipped from England. However, Mr. Vaughn did point out that certain quality grades for which buyers would pay some premium, could be retained for American sources if some consideration were given by the Lines to a rate reduction, pointing out that he had discussed the same problem with the Indian Lines who had recognized the situation and put into effect a reduction down to \$19. per payable ton.

I then advised Mr. Vaughn that Farrell Lines Inc. were indeed anxious to obtain at least some part of this business and inquired if a reduction of \$1.50 per payable ton might assist his company in selling high quality lubricants to South and East Africa. Mr. Vaughn replied he could not say exactly but would be willing to try it out. I then said to Mr. Vaughn I was sympathetic to such a reduction on behalf of our Company, but could not and would not put the rate into effect without the concurrence of both our Conference and non-Conference colleagues. I said that since Safmarine, Robin and Lykes were not in conference with us, it would be best if before we undertake to explore the matter with these carriers, making it clear that I had made no commitment to him, nor would I make any commitment to him without their agreement and support. I further said to Mr. Vaughn that there were other exporters of

Exhibit 43

lubricating products out of the Gulf and North Atlantic who undoubtedly would be interested, either in a reduced rate or perhaps in holding to the present rate, but who perhaps could best be contacted by carriers other than the Farrell Lines, since most of these other exporters generally shipped most of their cargo by Lines other than ours.

Mr. Vaughn undertook to lay the groundwork in accordance with my suggestion. Upon my return to the office yesterday, February 10, after a two day vacation, Mr. Vaughn advised me by telephone as follows:

1. Mr. S. J. Maddock of Robin was entirely sympathetic and would go along.

2. One of the other Lines felt that no specific action should be taken until Mr. Alphonse Schreck of Caltex Oil Company returned to New York, February 20 from his Florida vacation.

3. Lykes Lines, New York had communicated by teletype with Lykes Lines, New Orleans and the gentlemen in charge of traffic for Lykes at New Orleans had reacted very sharply and was very critical of Farrell Lines under the misapprehension that I had made some commitment to Mr. Vaughn and that the rate was already in effect. Upon learning this, Mr. Vaughn stated that he telephoned to another official of Lykes and straightened the matter out and that we might now expect a little more understanding from Lykes.

4. Safmarine were noncommittal, pending the return to business of Mr. Schreck.

In order that the question of a possible reduction in rates on lubricating products may be considered without any misunderstanding as to the position of Farrell Lines,

Exhibit 43

Inc. or of me personally, I now suggest that Mr. Unver bring Mr. McCracken up to date and that Mr. Shields discuss the matter with appropriate representatives of Robin, Safmarine and Lykes. I have made no commitment. Unless all concerned share my view as to the advisability of a reduction, I do not intend to make any.

On the other hand, I am convinced that as far as lubricating shipments from Philadelphia and New York are concerned, a reduction of \$1.50 is desirable to retain as much business as possible for North Atlantic and Gulf ports.

The decline in packaged shipments from Philadelphia and New York would affect the following commodities which appear in Item 1595, viz:

Absorption Oil, Non-Hazardous	Paraffin, Liquid
Additives	Petrolatum (Petroleum grease or Jelly not perfumed or medicated)
Batching Oil	Quenching Oil
Burning Oil	Reference Fuel, Standard
Cutting Oil, Non-Soluble	Slushing Oil
Diesel Oil	Spindle Oil
Dutproofing Fluid, Non-Hazardous	Sulphenated Oil (Petroleum Sulphanates)
Grease, lubricating	Sulphurized Oil
Grease, Cutting Non-Soluble	Transformer Oil
Grease, Tannin, Non-Hazardous	Transil Oil
Grease, Petroleum not medicated or perfumed.	White Petroleum Oil
Ink Oil, Non-Hazardous	White Industrial Oil, Non-Hazardous
Lubricating Oil	Wax, Paraffin
Mineral Spirits (N.O.S.)	Wax, Emulsion
Mineral Oil, White, for Industrial Purposes	
Napthenic (Residue) Oil	

Exhibit 43

The above named commodities are the ones to be reduced, if a reduction is decided upon.

The following commodities which also are listed in Item 1595 could continue to be rated as at present:

Benzine	Raw Distillates, Non-Hazardous
Fuel Oil	ardous
Gas Oil	Residue Oil, Non-Hazardous
Gasoline	Residuum Oil
Insecticidal Spray Base	Semi-Refined Distillates,
Jelly, not medicated or perfumed	Non-Hazardous
Kerosene	Shingle Oil
Naptha	Sludge Oil
	Solvents, No. 5, Non-Hazardous
	ous
	Wetting Agent

It would probably be necessary to divide Item 1595 into two parts, or to create a new item number. The rate on lubricating oil in bulk would not be changed.

JAMES A. FARRELL, JR.

Exhibit 47**JAF 40813****August 13, 1954**

**Mr. E. W. Lockwood
Wilbur-Ellis Company
334 California Street
San Francisco 4, California**

Dear Mr. Lockwood:

Further to our luncheon discussion of July 15, and your letter of July 23 in connection with the South Africa rates on fishmeal.

We have orally advised Mr. Richard Kulze and have cabled our Cape Town representative that the rate on fishmeal will be reduced to \$13.00 per long ton. This will apply from ports of Cape Town and Walvis Bay to North Atlantic ports. The rate will be effective immediately.

We are also pleased to advise that this rate has been concurred to by the Robin Line, Lykes and SAFMarine. It is our presumption that NedLloyd and Dreyfus will also use the rate. It is also our intention to maintain the rate through 1955, the exception being the outbreak of war or U.N. police action, etc.

It is our sincere hope that this reduction will enable the South African producers to hold their market in the United States.

We reciprocate your kind regards.

Yours very truly,

**FARBELL LINES
JAMES A. FARRELL, JR.
President**

JAF:jc

Exhibit 53**(FARRELL)****(COPY)****January 20, 1955****MEMORANDUM FOR THE FILES****W. Clifford Shields**

At the Directors meeting on December 28, 1954, I proposed that:

1. In order to legalize our position
2. As a possible opening step toward a conference
3. To reduce friction amongst the lines through personal contact

we form an "Association of lines operating between the U.S.A. and S/E Africa."

The several lines:

1. The Conference lines, either individually or represented by Mr. Phillips
2. Farrell Lines
3. Robin Line
4. Lykes Line
5. Safmarine
6. Dreyfus Line
7. Nedlloyd Line and, through Nedlloyd, Kawasaki Kisen Kaisha
8. Kerr Christensen Canadian Line

would agree to meet from time to time to discuss important rate changes by each line to retain independency of rate action. It might be made part of the agreement that no rate

Exhibit 61

change would be made effective by any one line until 48 hours after notification of the other lines.

That same day, December 28, 1954, I met Winthrop Cook and Mr. Don Lawrence at India House and offered this suggestion to them. Mr. Cook thought it was an excellent idea.

Yesterday, January 19, 1955, I discussed this with Mr. — S. Norton, Jr. who thought it an excellent idea but probably difficult to accomplish.

The matter will be left in abeyance until the proposed increases in the outward and homeward rates have been accomplished.

W. CLIFFORD SHIELDS

WCS:

cc: —, FJU J O' —, WCS

Exhibit 61

FJU 51213

December 13, 1955

Steamship & General Agencies, Ltd.,
P. O. Box 323,
Mombasa, Kenya Colony,
British East Africa.

Gentlemen:

We wish to refer to our cable #68, reading as follows:—

“INQUIRIES HERE BAGGED SULPHATE AMMONIA NACALA
DIRECT DISCHARGE RATE \$21.50 PER 2240 ADVISE POSSIBLE
SHIPPERS HERE”

and confirm ours to-day:—

“YOUR 81 SULPHATE WRITING”

Exhibit 61

In checking some rate adjustments with Robin Line, they indicated an interest in establishing a freight rate on sulphate of ammonia to be discharged at Nacala.

At the time of writing our cable to you, we had no inquiry here from shippers that they were shipping Sulphate of Ammonia to Nacala.

Therefore, we agreed with Robin to establish a freight rate to Nacala on bagged sulphate. We cabled you as per our #68, our thought being that you could possibly have some idea as to who might be interested in importing Sulphate of Ammonia, to contact these people and they would advise you as to who they were making inquiries on in this country.

We did not quite understand why you did not comprehend our message, but in any case you have our explanation herewith.

Yours very truly,

FARRELL LINES, INC.

F. J. UNVER

Traffic Manager—Operations

FJU.MT

Exhibit 62

NEDLLOYD LINE
25 Broadway
New York City

January 23, 1956

Mr. James Farrell, Jr.,
Farrell Lines, Inc.,
26 Beaver Street,
New York, N. Y.

Freight Rates Africa/Atlantic—Gulf Sisal
Flume Tow and Sisal Tow

Dear Mr. Farrell:

I just returned from a visit abroad, at which time there was called to my attention the fact that the Lines operating from Indonesia to Atlantic Coast/Gulf announced an increase, effective March 1st, of 10% making the rate \$20.50 per U3 as against the former rate of \$18.50 per U3.

Protests have now been received from shippers about this announced increase in which they bring out that the rates from East Africa on these commodities, are \$18.00 per 40 cft. on sisal flume tow and \$19.00 per 40 cft. on sisal tow, which are the equivalent of \$15.75 per U3 and \$16.62 per U3 respectively. Apparently, these commodities from Indonesia and East Africa are competitive and the freight rate plays a certain role.

You and we agreed on the fact that present rates on many commodities from Africa are hardly remunerative and in order to preserve the relation between the freight rate from these territories, this is perhaps the suitable opportunity to arrange for an increase on the African product, at least as large as the one recently announced in the trade from Indonesia. We might add that the rate on sisal from Indonesia will be increased from \$21.00 per U3 to \$23.00 per U3

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I shall be glad to hear whether you agree with us that an increase under the circumstances, is fully warranted. I am addressing similarly Messrs. Robin, Dreyfus and Lykes Lines.

For your guidance I wish to inform you that, as far as our rates from Africa to Pacific Coast ports are concerned, we are contemplating announcing an increase amounting to 15% to 20% effective March 1st.

Looking forward to your advices, I remain

Sincerely,

J. C. SEVERIENS.

CC Mr. J. M. Phillips, Sec.,
So. Africa/U.S.A. Conference, N.Y.

Exhibit 63

(Letterhead of)

FARRELL LINES INCORPORATED

January 30, 1956

Mr. J. C. Severiens,
Nedlloyd Line,
% Java Pacific Line, Inc.,
25 Broadway,
New York 4, N. Y.

Freight Rates from Africa

Dear Mr. Severiens:

Thank you very much for your two letters dated January 23 and January 27, subject as above.

I understand that Mr. J. C. Gorman, Vice President, Traffic of this Company has been in touch with you by tele-

Exhibit 67

phone concerning this problem which is of great mutual interest.

As he has advised you, that in agreement with Robin Line (Seas Shipping Company, Inc.) we have already raised our through bill of lading rate to Pacific Coast ports from South and East Africa via New York, to the levels which you have suggested.

I understand, inferentially, that your principals would like to see the inward rates from South and East Africa to Atlantic and Gulf ports increased again at this time. While no one is more aware of the need for greater revenue to compensate for the continually increasing costs of ship operation and cargo handling, I am not sure that all the inward rates from and to the areas we serve can be increased, except possibly after an item by item study, which we have now undertaken.

Thanking you for bringing these matters to my attention, I am

Sincerely yours,

JAMES A. FARRELL, JR.
President.

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FJU 60531
May 31, 1956

RE: IRON ORE
PACKED OR IN BULK

Mr. J. H. Phillips, Secretary,
U.S.A. South Africa Conference,
26 Beaver Street, N.Y.C.

Dear Sir,

We wish to revert to the rate action taken in March on the subject commodity.

We are advised by the shippers that it is necessary to review the \$24.00 rate established. It seems that the

Exhibit 67

buyers are complaining severely about shipping costs on this refined iron ore, particularly in view of the value which is about \$65.00 per ton weight.

It seems that the packaging costs are extremely high, and in view of the necessity to keep the commodity free of contamination with any other cargo, it cannot, at the moment, because of the quantities being offered are shipped in bulk.

It therefore has been suggested that we could assist in the continuance of the movement of this commodity by reducing our rate from \$24.00 Capetown to \$20.00 Capetown.

Will you please circularize the Lines? In the meantime, for your guidance, not to be shown on the rate circular, Messrs. Farrell, States Marine and Robin agree on the \$20.00 basis.

Yours very truly,

FARRELL LINES, INC.

F. J. UNVER
Traffic Manager—Operations

FJU.MT

Exhibit 68

FJU 60927

September 27, 1956

Mr. R. D. Warden,
Farrell Lines International Corp.,
P.O. Box 3841,
Johannesburg, S.A.

Dear Randy,

I have your cable #34, regarding the new rate situation on Oct. 1st.

First of all, Robin Line did not send out a Tariff. They, however, will probably be mailing them tomorrow. What Robin Line did was to take a selective list of commodities and wrote a letter indicating what the new rates should be. As I indicated in Bulletin of July 31st, if there were any rates required, to communicate with us and we would see that you received same. The Conference Tariff probably will not be dispatched from here much before the 8th.

The States Marine printed a Tariff, and I am sending you a copy herewith, which you can use as a reference. However, since this was printed, there are 35 to 40 corrections to same that they have not dispatched.

As far as the Conference Tariff is concerned, while we had hoped to have gotten same away before this, we are shooting for a Tariff without having to submit 35 or 40 corrections after it was issued.

Incidentally, the corrections to which I refer, were as a result of meetings held with personnel from States Marine, Robin and Dreyfus, and these meetings took considerable time to arrive at agreements, and resulted in additional corrections that will have to be made by States Marine, Lykes and Dreyfus, and to a certain extent by Robin.

Exhibit 68

In using the States Marine Tariff, you will have to indicate to your clients there that they are subject to change and are not guaranteed. For instance, as this is being written, the item covering automobiles, accessories, parts, and specialized type of auto trucks, the classification has not been settled with the Automobile Association, which we are hopeful will be done within the next ten days.

This is about the best we can do at the moment, and as soon as the Conference Tariff is available, and they are working day and night, we will see that copies are forwarded to you and others at the earliest.

Yours very truly,

FARRELL LINES, INC.

F. J. UNVER
Traffic Manager Operations

Copy to John T. Rennie—Johannesburg
“ “ Durban
Paul Duffy—N.O.S. 4847, Capetown

P.S. We have no tariff to send you, but if communicating with Mr. Warden will be quicker than communicating with us, we suggest you do so accordingly.

F. J. UNVER

FJU.MT

Exhibit 69**MEMORANDUM**

July 1, 1955

To: Mr. W. C. Shields, Jr.**From: Mr. J. A. Farrell, Jr.****Subject: SOUTH AFRICA CONFERENCE**

As you will recall, I had an appointment on Wednesday, June 29th, with Mr. Winthrop Cook, President of Seas Shipping Co., Inc. (Robin Line) in connection with South Africa Conference matters. In connection with this memorandum, I refer you to Captain Wanchope's memorandum to me dated 6/28/55 and my letters to Messrs. Mercer and Cook dated April 14, 1955.

I advised Mr. Cook that I had received a telephone call from Mr. Henry Mercer about June 20th, upon his return from the West Indies, and that in his telephone message, Mr. Mercer had advised me that Safmarine had, as per my request to Mr. Bamford on May 20th, re-considered our invitation to join the South Africa Conference which Safmarine had previously declined. I said to Mr. Cook that Mr. Mercer had added that Safmarine was in great trouble with its government over its membership in the U.K./South African Conference and certainly would not consider participation in the American Conference until at least after the August meeting at Capetown when the British Conference Lines, together with Safmarine, are to hold discussions with the Union Government.

I told Mr. Cook that Mr. Mercer said that Mr. Bamford was playing a careful game and was trying to make a trade with the British Conference Lines to deliver the approval of the Union Government for higher continental rates in exchange for more sailings in the British trade

Exhibit 69

for Safmarine. I told Mr. Cook that I was more or less convinced now that Mercer was using Bamford as an excuse so that he could withdraw from his commitment to me, to wit: Mercer to join the Conference if Cook did.

Cook then said that his position remained unchanged. Robin would join the Conference if *all* Lines were in. Actually, this is a change in position by Cook because he emphasized "*all* Lines"—to include Dreyfus and Ned Lloyd, but he never previously made this addition.

Mr. Cook dwelt at some length upon the fact that Mr. Maguire now occupies senior position and we could expect full co-operation on rates and no rates cutting. He said that Mr. Maguire had been instructed to keep in touch with W.C.S. Jr. and keep the rate situation to our mutual satisfaction.

Mr. Cook said that he had consulted with Mr. Hupper, the lawyer, on the question of liability for rate discussions when one or more parties are not members of group conferences. Mr. Cook said that Mr. Hupper had advised him that Lines in or out of Conference could discuss rates and could agree each to establish identical rates but that they could not agree to abide by such rates if either party wished to take independent action. I could not follow Mr. Hupper's position and I am asking Captain Wauchope to suggest to Mr. Geary that he talk to Mr. Hupper about the matter.

J. A. F., Jr.

JAFjr:B

cc—Capt. G. Wauchope.

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NO TO NY RCC JPOK YR 7 WHILE MANY LOOPHOLES WE WILL GIVE OUTWARD SITN INCREASE OF 15% A FAIR TRIAL HOWEVER DOUBT WISDOM OF MANY COMMODITIES INCREASING EFFECTV FEBY 1 PARTICULARLY VIEW HOLIDAY SEASON AND THK THIS FEATURE MUST B GIVEN FURTHER CONSDRTN. ALSO AS FAR AS PETROLEUM PRODUCTS INCLUDING ASPHALT ARE CONCERNED WANT KNOW DEFY THE REACTN OF VAUGHAN PARTICULARLY ALSO SCHRECK AND SMITH. ALSO WANT KNOW ATTITUDE OF MADDOCK—DREYFUS VIEW TRINIDAD COMPETITION. AS YOU RECALL SOMETIME BACK WE WERE FORCED REDUCE GULF RATE ACCT MADDOCK'S INSISTENCE IN DOING IT OVR OUR OBJECTN THAT GULF ASPHALT RATE MUST B THE SAME AS TRINIDAD AS I VIEW YOUR TELETYPE HE IS NOW ABOUT-FACE ON THIS SITN. WE ARE PERFECTLY WILLG NOTIFY ALL CONCERNED AS TO LONG-RANGE COMMITMNTS WE HV ON OUTWARD RATES. THIS IS A DEF AGRMNT BETWEEN THE LINES AND WE ARE FIRMLY OF THE OPIN SOME SORT OF AGRMNT BETWEEN ALL THE LINES INVOLVED MUST B FILED WITH THE FMB AND AM WONDERING HOW STATES MARINE WL VIEW THIS AS THEY HAVE STEADFASTLY NOT BN WLG TO CONSDR ANY CONFRNC SETUP SO TO SPEAK. AS FAR AS HOMEWARD SITN IS CONCERNED WE ARE NOT WLG TO AGREE ON THE ORE RATES MENTND WITH DREYFUS AND NEDLLOYD TAKG THE POSITN THEY HV. IT MUST B AN AGRMNT WITHOUT EQUIVOCATION AS FRANKLY WE STILL ARE DUBIOUS ABOUT THIS ALTHO WE WANT TO GET THE RATES UP AS MUCH AS WE CAN AND WE DO NOT HOWEVER THK ANY AGRMNT SHLD B REACHED ON ORE RATES IN VIEW OF THE POSITN TAKEN PARTICULARLY BY DREYFUS. THERE IS ONLY ONE SHPR FRM WALVIS BAY AND OUR RATE HAS NOT BN A SECRET ONE. THE RATE HAS BN OPEN AND WE HV NEGOTIATED WITH OUR FRIENDS AMER METALS SO WHY MADDOCK—SHIELDS ETC. SHLD HV LOOKED AT YOU IS A LITTLE DIFFICULT TO UNDRSTND. DREYFUS HAS TAKEN A RATHER PECULIAR ATTITUDE WANTG TO HNDL THIS LEAD ORE WHEN IT SUITED THEIR CON-

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VENIENCE. OUR RATE IS OPEN PERIOD AND IT IS RESULT OF NEGOTIATIONS WITH OUR FRIEND BIEN BUT IF HE HAS NO OBJECTN WE ARE WLG TO ANNOUNCE THE RATE SO TO SPEAK. THIS IS ENTIRELY DIFFERENT FRM THE GENL ORE SITN WHERE THERE ARE MANY SHPRS AND RECVRS INVOLVED. SURE LOOKS LIKE MADDOCK PARTICLY AND SHIELDS ALSO CHANGING THEIR POSITN ALSO INCLUDING TRINIDAD ASPHALT. WE CERTNLY WANT TO GET THE RATES UP BUT WE HV TO BE CAREFUL AND NOT STICK OUR HEADS IN A NOOSE AND WE ALSO FEEL VERY STRONGLY SOME KIND OF AGRMNT BETWEEN ALL THE LINES INVOLVED MUST B FILED WITH THE FMB. PLS DISCUSS FURTHER WITH MADDOCK AND SHIELDS ADVSG. IT LOOKS LIKE THINGS ARE GOING ALONG SWIMMINGLY AND EASIEST THG WOULD BE FOR DREYFUS NEDLLOYD ALSO SAFMARINE JOIN THE GULF CONFRNC AND THEN WE WOULD NOT HV TO B FACED WITH SO MANY IFS AND ANDS ACC 12-23-54

CC SBT, c/o Jamaica GBS,DURBAN ACK/AJT,LDN. TPB, WASH.

JML,JR/AWL, HO. JGT, GX.—all with copy of NY's 71

Exhibit 82

ACC New Orleans
GBS Durban

December 29, 1954

Dear Gerry:

Proposed Increases South & East African Rates
outbound, as well as Ore Rates homeward

With regard to increasing the ore rates, we confirm
our cable of December 28 reading as follows:

"ROBIN FARRELL ANNOUNCED FOR PERIOD
JAN 1 THRU MAR 31 CHROME DURBAN LOURENCO
DOLLARS NINE BEIRA TEN MANGANESE DURBAN
LOURENCO NINE BEIRA TEN ALSO MANGANESE
CAPETOWN TEN WITHOUT PUBLISHING RATE
STOP DREYFUS ON INSTRUCTIONS PARIS
AGREED CONFERENCE RATES ON PARCELS UP
TO 2000 TNS BUT NO AGREEMENT LARGER LOTS
STOP NEDLLOYD WOULD NOT AGREE FIXED
RATES REGARDLESS QUANTITY STATING WLD
QUOTE FIFTY CENTS UNDER STOP OUR VIEW
IS WILL TRY GET FARRELL ROBIN RATES VIEW
ATTITUDE DREYFUS NEDLLOYD MUST TAKE
POSITION QUOTE WHATEVER RATES NECES-
SARY SECURE BUSINESS CABLE YOUR VIEWS".

Dreyfus seems to want increased rates but on its own
terms, and I certainly do not think we should tie ourselves
up with Robin and Farrell when Dreyfus and Nedlloyd
take the position they do. Our idea is to try to get the
North Atlantic rates but to trade on the larger parcels
when it is necessary.

Robin and Farrell to increase all outbound
rates by 15%, effective February 1; however, we have felt
all along this was a little too short notice and Robin and

Exhibit 82

Farrell now feel about the same way, as in this connection New York teletyped on December 28:

"INCREASE SOAFR TRADE DELAYED 1 MONTH UNTIL MARCH 1 DEPENDING ON WORKING OUT ACCEPTABLE UNDERSTANDING BETWEEN LINES PRIOR END JAN. DREYFUS WILLING GO ALONG NAMING EXCEPTIONS AFTER ANNOUNCEMENT BUT PREFERRED PLACING EXCEPTIONS BEFORE OTHER LINES PRIOR ANNOUNCEMENT WHICH MIGHT BE HELPFUL FROM STANDPOINT OF LOOKING AT DREYFUS COMMITMENTS. NOTHING HERE RE SYNTHETIC RUBBER OTHER THAN THAT PRESUMABLY PRESENT RATE WILL BE MAINTAINED AND WILL BE INCREASED ALONG WITH OTHER ITEMS UNLESS EXCEPTED. RE FOREIGN COMPETITION WE UNABLE LAY IT ON LINE WHAT MIGHT BE LOST BUT PRESUMABLY 15 PCT WOULD NOT BE ALL DETERMINING NATURALLY SHIPPERS RELUCTANT GIVE SUGGESTED INCREASE MUCH ENCOURAGEMENT ALSO ASSUME YOU WILL PERSONALLY WITH SCHRECK PRIOR TO ANY ANNOUNCEMENT. TRINIDAD SITUATION PRESUMABLY SUBJECT TO WHAT HAPPENS TO TRINIDAD RATE IF IT DOES NOT GO UP SOME QUESTION WHETHER MADDOCK WILL BE WILLING INCREASE ASPHALT 15 PCT. RE OTHER COMMODITIES INTERNATIONAL PAPER HAS STATED AGREEABLE GO ALONG 15 PCT ON BASIS INCREASE ACROSS THE BOARD TO NONDISCRIMINATORY. HAVE NOT DISCUSSED WITH CARBLACK PEOPLE AS RELUCTANT GET THEM EXCITED BUT QUESTIONABLE WHETHER 15 PCT INCREASE WOULD MEAN ANY MORE CARBLACK MOVING FROM U. K. PRESUME OUR APPROACH WITH OTHER INTERESTED LINES SHOULD BE WE GOING ALONG WITH INCREASE AND THAT WE WILL COME UP WITH DESIRED EXCEPTIONS IN NEXT SEVERAL DAYS ALSO WILL BE PREPARED TO ADVISE RE FORWARD COMMITMENTS. ASSUME YOU WILL GIVE US DETAILED INFO SHORTLY."

Exhibit 82

When we do reach an understanding, it means that tariffs will be exchanged and that if the lines are not in accord about rates then one line will advise the others what they are going to do. This is really an informal agreement and I still think something should be filed with the Maritime Administration but Messrs. Robin and Farrell feel otherwise, and in this connection New York advised us on December 27 as follows:

"AT OUTSET MEETING 12/23 EMPHASIS WAS GIVEN THAT CONVERSATIONS ON SUBJECTS MUTUAL INTEREST SHOULD NOT BE CONSIDERED AS AN AGREEMENT REQUIRING AN FMB FILING. ROBIN POSITION NO. ATL RE JOINING CONFERENCE UNCHANGED AND DREYFUS INDICATED NO INTEREST GULF ASUME SAME POSITION NEDLLOYD SAFMARINE. ROBIN FARRELL CONSIDER EXCHANGE TARIFFS AND DISCUSSIONS PRIOR RATE CHANGES BETWEEN GULF LINES NO DIFFERENT FROM PRACTICE BETWEEN NO. ATL LINES WHICH HAS WORKED OUT SATISFACTORILY WITHOUT FMB FILING."

Be that as it may, we would certainly prefer a memorandum agreement be filed with the Maritime Board, and in this connection we kindly ask that TPB discuss same informally with Odell Kominers (not with anyone on the Maritime Board) and let us have Odell's comments.

There is going to be some resistance from some of the shippers about the increases, particularly petroleum products, since there is competition from Europe and, to a certain extent it is the same as the asphalt from Trinidad vs USA asphalt situation, although on one hand Robin and Farrell, particularly Syl Maddock of Robin, insist on applying the same asphalt rate from the USA as from Trinidad whereas, on the other hand, they are willing to ignore European competition on lubricating oil and other petroleum products.

We are more than anxious to get increases in the rates but, frankly, unless we have Dreyfus in a real agreement we just don't trust them. They recently reduced the rate,

Exhibit 82

as you know, on synthetic rubber and Ponchelet in New York gave out the statement that instructions to reduce the rate came from Paris, whereas I understand Paris states it was done in New York. In other words, when rates are reduced, one passes the buck to the other. There was no reason for reducing the rate on synthetic rubber except to make capital with the shipper. Be that as it may, we are certainly going to try to get rates up and would like very much to have London and you give us the benefit of your views regarding the competitive rates on commodities that are being shipped from foreign destinations to Africa vs the USA, such commodities being petroleum products, agricultural implements, automobiles, carbon black and anything else that you think may be of interest to us. We are attaching to this letter a list of the principal commodities presently being shipped from the Gulf in which we are vitally interested, so if any of these commodities are moving from Europe to South Africa, we would like to have your views and comments as to rates, etc.

Yours very truly,

A. C. COCKE.

ACC/mb

cc: ACK/AJT—London

RCC/RNT/JPOK—New York

JML, Jr./AWL—Houston

JGT—Galveston

WAC/EMP/JET III—Office

TPB—Washington

Copies to:

MDP: CHICAGO

GMB: EC

MJR: ST. LOUIS

WLVJR: MEMPHIS

JCW: JES DALLAS

WHM: MOBILE

SSG: TAMPA

AJA: LK

For your information.

ACC/12-30-54/jbg

Exhibit 83

LYKES LINES (For Inter-Office Correspondence Only)
From R. C. Colton, New York Office
To A. C. Cocke, New Orleans Office

Date January 24, 1955

SUBJECT—SOUTH AFRICAN RATES

Dear Alex:

Now that the increase has been announced, we understand that we are operating under new conditions with Dreyfus, States Marine, i.e. that neither of the three of us will change any rates without giving advance 48 hours notice to the other two and will endeavor to discuss the rate matters from a standpoint of cooperating to whatever extent may be indicated.

It is also understood that one of the three, Lykes, States Marine, Dreyfus (probably the one initiating the change) will agree to call Jack Phillips who in turn will serve as liaison on the notice re proposed rate changes with the Atlantic African Conference and Syl Haddock of Robin.

This new procedure is on a tariff exchange basis so I assume you will have Al Caryls mail tariffs to Mr. Jack Ponchelet, Sagus Marine Corp., 21 West Street, New York 6, N. Y. and to Bill McGrath of States Marine Lines, 90 Broad Street, New York 4, N. Y., and keep them on the mailing list for changes, etc. If you will let us know when the tariffs are mailed we will advise Ponchelet and McGrath and ask that they do likewise for us here in New York. I assume that you may also wish to have them supply you in New Orleans with these tariffs although perhaps you will want to do this through Messrs. Roberts and Johnson. I appreciate that there can be some interchange of rate in-

Exhibit 83

formation both at New Orleans and New York and would appreciate your views as to just how you would want this to be worked because obviously we would not be passing any information up here in New York other than as you might indicate to us but at the same time the liaison with the Conference and Maddock must of necessity be here.

Your views and advices in respect to the above will be appreciated.

Very sincerely,

(B. C. COLTON)

1-27-55 cc HAC—Gulf Conference Dear Al: Please so handle the mailing of the tariffs etc. and let me know when mailed.

ACC

Exhibit 88**ACC New Orleans****ACK London****May 16, 1955****Dear Alec:**

We have a "Gentlemen's Agreement" with Robin, Farrell, Dreyfus and, also, States Marine, whereby all Lines have agreed to Conference rates and regulations to South & East Africa, but any Line can—by giving 48 hours' notice—do as they please, so to speak.

There are many instances when Dreyfus' Agents in New York, particularly a young man named Ponchelet, forget about the agreement, and it is usually blamed on Paris, London, or some other place.

For your personal information, and for your diplomatic discussion with Mr. Mann, if you think it is advisable, I attach here copy of my recent exchange of teletypes with New York, which you will find to be self-explanatory.

Ponchelet should certainly not have agreed to the brokerage without first talking the interested Lines of what they were going to do. I, also, don't like the way the cotton matter was handled.

Harold Roberts tells me Jack Ponchelet is in London, so it may be well for you to have a diplomatic talk with Mann, but, of course, don't show him these exchanges.

If you do discuss the matter with Mr. Mann, will appreciate your advices.

With kindest regards, I am,

Very sincerely yours,

A. C. COCKE

ACC:A
atts.

Exhibit 94

ACC New Orleans
RCC New York

January 27, 1955

Re: SOUTH AFRICAN RATES

Dear Dick:

Thanks very much for your letter of January 24, and we have requested the Gulf/South & East African Conference to forward tariffs to Messrs. Ponchelet and McGrath, and tariffs will continue to be furnished Robin and Farrell. Also, all concerned will be on the mailing list for corrections, etc.

As far as exchanging rate information in New Orleans is concerned, we are going to, at times, discuss the matter with Messrs. Roberts and Johnson; however, officially, we will handle the matters through you, for necessary handling with Jack Phillips, who will act as liaison on the notices regarding proposed rate changes with the Atlantic African Conference, Robin Line, States Marine, and Dreyfus.

We suggest that, inasmuch as all tariff matters are going to be actually handled in New York, Dreyfus and States Marine send us copies direct from New York, the same as Robin and Farrell do. We, also, ask that a copy of the tariffs, as well as corrections, from time to time, be sent direct to Mr. Carlys, Chairman of the Gulf/South & East African Conference.

With kindest regards, I am,

Very sincerely yours,

A. C. COCKE

cc H. A. Carlys, Chairman,
Gulf/South & East African Conf.
Whitney Bldg., N. O.

Exhibit 98

19. RUSH RUSH RUSH ACC YR 78 2/4 MCGRATH AND PONCHELET EXTREMELY DISTURBED REOUR INSISTENCE EXCEPTG RICE FROM 15 PCT INCREASE SITUATION HERE IS THAT TERRIFIC PRESSURE BEING EXERCISED ALL LINES TXX HOLD TO 15 PCT INCREASE WITHOUT ANY MORE EXCEPTINS THAN ALREADY ON BOOKS AND EA EXCEPTN MADE WEAKENS THE ABILITY TO HOLD THE LINE AND SETS UP ALLEGED DISCRIMINATN. MCGRATH FEELS SO STRONGLY AND IS SO UPSET THAT HE SAYS HE NOW WILLG GIVE UP THIS WHOLE IDEA OF WKG TOGETHER. WHAT HE URGENTLY REQUESTS US TO DO IS REDUCE RICE RATE AFTER MARCH 1 IF ANY BIZ INDICATED AND THEN REDUCE THE XX TO RATE THAT WLD MOVE BIZ BUT BOTH DREYFUS AND SAFMARINE CLAIM NO RICE MOVING ANYWAY AND TO MAKE EXCEPTION ON RICE IN VIEW OF THAT SITUATN IS JUST BEYOND THEIR UNDERSTANDG. WE HONESTLY FEEL THAT TO HOLD FOR THIS EXCEPTN IS GOING TO WEAKEN THIS AGREEMT TO EXTENT WE MAY NOT EVEN GET IT STARTED OFF PROPERLY IF AT ALL. PLS RECONSIDER AND ADVS YR VIEWS SOONEST AS ALL CONCERNED HERE REALLY UPSET. RCC/JPOK

QZ 05054

Exhibit 99

RUSH RUSH WAO SBTPLS NOTE YR 69 YEST UNDER-
STANDG SO AFRICA SPECIFICALLY CARRIES COMMITMT
EA LYKES DREYFUS SAF MARINE NOTIFY OTHERS
INCLUDG CONF & ROBIN 48 HOURS BEFORE MKG ANY
RATE CHANGES AND CERTAINLY ONCE WE HAD EX-
CEPTNS CLEAR ENDG WITH OUR CARBLACK AND
DREYFUS SYNTHETIC RUBBER IT WAS UNDERSTOOD
NO MORE EXCEPTIONS WLD BE MADE AT LEAST
UNTIL MARCH 1 ACCT ABSOLUTE NECESSITY HOLD
THE LINE BECAUSE ALRDY PRESSURE IS GREAT FOR
EXCEPTNS SHIPPERS CLAIMG DISCRIMINATION ETC.
WE HONESTLY FEEL SAFMARINE XXXX. WE HON-
ESTLY DO NOT FEEL SAF MARINE OR DRYFUS HAVE
FAILED LIVE UP UNDERSTANDG AND WE THINK IT
IS THEIR INTENTN TO DO SO ON BASIS WE ALL AHEAD
FINANCIALLY. WHILE WE DO NOT HAVE COPY
CARLYS TARIFF IT SEEMS OBVIOUS HE EXEMPTED
RICE WITHOUT GIVING DREYFUS SAFMARINE CONF
OR ROBIN ANY NOTICE AND ON THIS BASIS SAF-
MARINE ALRDY STATG IT JUST WONT WORK AND
ON THAT BASIS THEY TALKG ABT PULLG OUT. LIKE-
WISE DREYFUS CONF AND ROBIN EXTREMELY DIS-
TURBED. THIS MOST REGRETTABLE BEFORE UNDER-
STANDG GETS UNDER WAY THEREFORE WE THINK
ONLY CHANCE GETTG THINGS GOING IT TO APOLO-
GIZE TO ALL CONCERNED STATG WE DID THIS UNIN-
ENTIONALLY AND THEN WE THINK THINGS MIGHT
GO ALONG WE HOWEVER NOT GOING TO ADVE THEM
WITHOUT YR APPROVAL. AS INFO DOESNT MAKE
ANY DIFFERENCE THAT RICE IS LOCAL IEM AND
MOXXXX ITEM AND MOVG SMALL LOTS POINT IS
ALL HERE N Y FEEL EXCEPTNS HAD GONE AS FAR
AS CLD POSSIBLY GO WITHOUT FURTHER TROUBLES
AND THEY BELIEVE WE CLD HAVE HANDLED THIS
RICE MATTER AFTER THE FIRST OF MARCH ON BASIS
RATE REDUCTN. ADVS SOONEST AS THIS VERY
URGENT MATTER FAR AS WE CONCERNED HERE IN
N Y.

RCC/JPOK

QZ 05050

Exhibit 100

50 RUSH ACC YR 4 YR UNDERSTANDG NOT ACCRDGY
TO WAY LINED UP HERE PER MY RECENT LETS AS
STATED DREYFUS HAVE NOT YET FURNISHED TARIFF
AND CERTAINLY THERE IS NO UNDERSTANDG WHAT-
SOEVER THAT DREYFUS AGREES NAME SAME RATES
OUR TARIFF UNDERSTANDG IS THAT WE EXCHANGE
TARIFFS AND ADVS EA OTHER BEFORE ANY RATES
THESE TARIFFS CHANGED. RATES NOW IN TARIFF
STAND UNLESS WE NEGOTIATE MUTUALLY FOR
SOMETHG DIFFERENT THAT IS WAS IS WAY WE
UNDERSTAND AND THERE HAS NEVER BEEN ANY
OTHER STATUS. FAR AS WE CONCERNED DREYFUS
LIVED UP TO AGREEMT AS STATED TO DATE AND
WE CERTAINLY ON ALERT TO ADVS IMMEDLY ANY
SITUATN WHERE THIS NOT TRUE MADDOCK AND
SHIELDS UNABLE OFFER ANY DIFFERENT APPROACH
BUT NATURALLY ALL CONCERNED WLD BE VERY
PLEASED HAVE DREYFUS SAFMARINE AND LYKES
QUOTE SAME BASIS AND ALSO PARITY WITH NO ATL
BUT SO FAR THIS JUST NOT THE SITUATION.
RCC/JPOK

QZ 05065

Exhibit 101

46

ACC YR 72 FEB 2 AS STATED OUR LET DREYFUS
HAVG THEIR TARIFF PRINTED SO UNBLE PROVIDE
COPIES FOR WEEK OR SO HOWEVER GEN FEELG
CERTAINLY IS THAT THEIR RATES PRETTY MUCH
SAME AS OURS BUT UPON RECEIPT TARIFF WILL
CHECK OUT AND LET U KNOW WHERE DIFFERENCES
EXIST BUT PLS REMEMBER THAT OUR AGREEMENT
WAS THAT WE WLD INCREASE ALL RATES 15 PCT AND
NEVER DID WE EVER AGREE THAT RATES WLD BE
QUOTED ON PARITY HOWEVER BELIEVE PARITY CAN
BE ACHIEVED ONCE WE GET LOOK AT TARIFF AND
NEGOTIATE ON INDIVIDUAL RATE BASIS WITH DREY-
FUS. ON BASIS RELATIONSHIP THUS FAR WE CER-
TAINLY CANNOT RECOMMEND CALL WHOLE THING
OFF AS THIS CLD WELL LOSE US REVENUE SO WE
RECOMMEND HOLD OFF ANY ACTION IN THIS DIREC-
TN UNTIL WE CN HAVE FURTHER LOOK AND AT
LEAST SOME EXPERIENCE ON HOW THIS NEW DEAL
GOING WORK. AS INFO JACK PHILLIPS HAS COPY
DREYFUS OLD TARIFF SUPPLY NO EXHAUSTED
WHICH REASON DREYFUS REPRINTG AND PHILLIPS
TELLS US ONLY DIFFERENCES BETWEEN OURS AND
DREYFUS RATES IS ON ROOFING PAPER GLYCERINE
AND CARBLACK IN CARTONS. HOWEVER WE WILL
ADVS U SOONEST WE RECEIVE TARIFF. RCC/JPOK

QZ 5063

Exhibit 104

Please refer to file

LYKES LINES (For Inter-Office Correspondence Only)
From J. P. O'KELLEY New York Office
To J. C. TOMPKINS, III New Orleans Office

Date December 2, 1955

AFRICA/U. S. A.

Ferro Silicon—Under 48% or over 65% Silicon

Dear Jimmy:

I am sure you will remember our exchange the other day regarding Dreyfus' proposal to establish a rate of \$25.00 W per 2240 lbs on Ferro Silicon homeward.

After we advised you that Dreyfus was publishing the rate you asked: "are other North Atlantic Lines also publishing this rate * * *, etc.", which point was readily cleared up.

In the interest of saving words in our teletype message, I would suggest that you and EWP let it be understood that any time we wire you that a rate is being published that automatically it follows that the other interested lines do not object to the rate. If there are objections we will specifically mention them in our wire. In other words, unless we stipulate to the contrary let it be understood that all others do not object to the rate proposed.

On the other hand, this does not necessarily mean that all of the other entities involved *will publish* the rates as Phillips, particularly, often states that whereas they have no objections to a rate proposed their concurrence does not necessarily mean that they will publish the rate.

Whereas we thoroughly subscribe to your views that it would be highly desirable that all of the tariffs be published in the same form and include the same rates

Exhibit 109

there is no understanding that this will be done, therefore, we have no basis to protest if any publishing agent elects not to include certain rates in their tariffs.

What you all think?

Yours very truly,

QZ 2671

J. P. O'KELLEY.

JPO'K/mjv

cc: EWP—Nola.

"Mr. Cocke—this is not my understanding of our 'Gentleman's agreement with other lines.' I thought the idea was to have all tariffs as much alike as possible—otherwise the purpose of agreement will eventually be defeated. Am I correct in my thinking and may I reply along these lines."

JGT

"JGT III—EMP

no one interprets it the same—if some lines agree & others do not, we must have full & complete details before we will act on any N. Y. proposal as in reality we have no agreement gentleman's or otherwise. ACC."

Exhibit 109

98 ACC/EWP NEDLLOYD HV CNVINCED DREYFUS THEY THROEXX THROWG REVENUE AWAY BY MAINTAINING PRES RATES ASPHALT ROOFG AS THERE HAS BN REGLAR MVMT FM PAC COAST AT \$21.50 W CT BASIS \$2.50 W LM \$26.50 W BEA MAIN PORTS. IF ALL OTHR LINES CNCUR DREYFUS WL CHNGE \$16.25 W RATE TO \$22.50 W BEA FM \$20.25 W TO \$26.50 W MADAGASCAR FM \$27.75 W to \$38.25 W ADV. JPOK

QZ 02416

Exhibit 116

COPY

April 6, 1954

Our Ref:
WHMcG/eh #1160

Confidential

Mr. H. Bees
South African Marine Corporation Ltd.
P. O. Box 2171
Cape Town, South Africa

Dear Harold:

Thanks for your letter of March 22nd, reference HSB/BQ-836, enclosing extract of letter received from Brown, Jenkinson.

Beardon Smith had given us similar advice and, frankly, it was most opportune for the following reason:

A few months ago we were advised by Farrell Line that Ray Vaughn, Traffic Manager of Socony, had approached them and Robin Line advising that the rates on lube oil from the United States versus United Kingdom were not competitive. At that time we advised both Farrell and Robin that we had not been approached by Ray Vaughn or any of the other oil companies and we thought that the matter should be left alone until such time as we were all seriously pressed to take some action.

Last week, the by-play started in earnest; there was a lot of talk back and forth but what it all simmered down to was that Ray Vaughn had lunched with Jim Farrell when Jim Farrell had asked him whether or not \$1.50 would help his situation. Vaughn then went to Robin and Lykes Brothers telling each of them what Farrell had offered, asking if they would go along and again they both agreed. When Farrell took this up with us we advised them that we could not consider a rate request from one shipper

Exhibit 116

without taking into consideration the position of other shippers of the same commodity, particularly, when it involved such substantial shippers as the oil companies, nor would we be in favor of a rate reduction unless it would keep business to the United States that would otherwise be lost; alternatively that it would make additional business available; failing this we could see no justification for a rate reduction unless the oil companies, as a whole, felt that the steamship companies were making too much money on the rates in effect.

We then discussed this matter with both Caltex and Asiatic who assured us that there was no need for a rate reduction, in that exports from this country would not be competitive with exports from the U. K. unless an ocean freight reduction in excess of \$4. a ton was granted and then there was always the possibility that the Lines ex the United Kingdom could further reduce their rate. Caltex made a point and Asiatic agreed that both Socony and Asiatic had refineries in England as well as in the United States and they could ship from either place, depending upon their production and domestic requirements. Caltex also made a point of Dreyfus' competition and the fact that Dreyfus were soliciting their business at reduced rates and while they preferred to support the regular lines in the trade still if we were going to make ridiculous rate reductions, then maybe they were mistaken in being loyal to the regular lines. As a result of all of this, we advised both Farrell and Robin and Ray Vaughn that we could not see a rate reduction at this time and that we were fearful that such a reduction might initiate some of the oil companies taking advantage of Dreyfus' offerings and there was no telling where the rate would finally end.

There can be no question but that this is strictly a rate cutting maneuver by Ray Vaughn and undoubtedly we are going to get even less of his business in the future than we have in the past, as he is not going to like having his pride

Exhibit 117

hurt and will undoubtedly try to use as a whipping boy for the future. We did, however, buy about one and a quarter million barrels of bunkers from Socony during 1953 and could make substantial purchases from them this year and we are certainly going to use this to the best advantage in obtaining a fair share of Socony's exports.

I presume you are aware that the lube oil we are carrying for Caltex and Asiatic on the "Morgenster" from the Gulf of Madagascar is at full conference rates, whereas Dreyfus has published rates of \$5. a ton lower for April/May which was with the hope of getting this particular business away from Safmarine.

Sincerely yours,

W. H. McGRATH.

WHMcG/eh

VH 0036

Exhibit 117

COPY

Aug. 21, 1957

Our Ref:

WHMcG/eh #2754

Mr. George Fullerton

South African Marine Corporation Ltd.

P. O. Box 2171

Cape Town, South Africa

Dear George:

While we have been cognizant, for some time, through the exchange of cables that Lykes might have booked, through Export Leaf, United tobacco's 1,000,000 Lbs. at the same rate as last done, i.e. \$3. It was only yesterday, upon receipt of an offer from Universal account Rembrandt

Exhibit 117

to book with us 100,000 Lbs. at the same rate as Lykes that we were able to question Lykes. We told them that the business was offered to us at the rate that they were quoting, i.e. \$3. and asked how this could be true when they had a gentlemen's agreement with Farrell and Robin Lines to maintain rates and to give 48 hours notice of contemplated rate changes.

Dick Coulton, Lykes Brothers' New York man, could not understand this being true but agreed to check it with New Orleans and subsequently called to say that they were now giving us 48 hours notice that they intended to quote a tobacco rate of \$3.00 per 100 Lbs. We pointed out to Mr. Coulton that we were fully aware of the business that had been done and apparently a gentlemen's agreement with Lykes had no substance. We also advised Robin and Farrell of what Lykes had done and we have now established a tobacco rate of \$1. per 100 Lbs. and have advised Billy Pierce of Export Leaf, accordingly.

I know that you will not fail to thank Rembrandt Tobacco for their consideration of Safmarine and we, in turn, are pleased that, at least, the people friendly to Safmarine will get the benefit of this windfall, occasioned by Lykes' stupidity.

With kindest regards,

W. M. McGRATH.

WHMcG/eh

cc: Mr. F. Demarco

VH 0053

Exhibit 118

(Copy)

Our Ref:

WHMcG/eh #2837

Nov. 6, 1957

Mr. J. G. Finlay
South African Marine Corporation Ltd.
P. O. Box 2171
Cape Town, South Africa

Dear Jock:

I acknowledge receipt and thank you for your letter of October 24th.

Incidentally, the "King Robert" sulphur parcel of 3,000 tons was obtained by Hugh TenEyck of International Ore and Fertilizer while in London from AFEX to combine with his 5,000 tons of ammonium sulphate, all of which was freighted at \$10.

I am going to have lunch today with Hugh TenEyck along with Robin and Farrell, in the hope that we can all agree with him an equitable freight rate on his business and keep him away from U. S. Navigation. I do not believe that International Ore can make their ammonium sulphate available in quantities of more than 5,000 tons but rather in many cases the parcels will probably not exceed 2/3,000 tons and it is, therefore, most important to try and keep him from combining his business with the balance of the open sulphur which might give U. S. Navigation access to substantial parcels around which to build their service.

Neils Johnsen assured me, last week, that Central Gulf was not going into the U. S. A./South African Service but rather intended working some of their Persian Gulf vessels home via South Africa. He was very disappointed in not getting the American Metals business but if he had to lose it was happy that it went to us. Central Gulf has the

Exhibit 124

"Milrose" on long period charter at a very high rate and the vessel is presently fixed to Mutual at \$7.75 from South Africa to U.S.N. for about 9,000 tons, with owner's option of completing with other cargo. Please endeavor to watch not only Central Gulf's but also Lykes' northbound liftings of General that we might, in turn, consider this business for the future.

With kindest regards,

W. H. McGRATH

cc—Mr. A. Pilaro

Exhibit 124

(COPY)

NEDLLOYD LINE

Nedlloyd Line, Amsterdam

March 24, 1955

FREIGHT RATES—ATLANTIC—PACIFIC

Gentlemen:

Enclosed please find copy of a circular dated March 22nd of the South Africa/U.S.A. Conference, indicating increases and changes in freight rates which have been tentatively agreed upon between the Conference Lines and Robin, who are still in communication regarding same with the Dreyfus Line and Lykes, besides ourselves. This matter is expected to be finalized shortly, at which time it will also be decided when the new rates will become effective.

We will inform you and Capetown Agents, in due course, about further developments. In the mean time we have also forwarded a copy of this circular to San Francisco Agents, with request to let us have their suggestions about changes to be made in the Africa/Pacific tariff. In this connection we are informing them that it is our idea to

Exhibit 124

increase rates to the Pacific Coast on a dollar for dollar basis with those arranged to the Atlantic.

Of particular interest we mention that on sisal and sisal tow, an increase of only \$1.00 was agreed, whereas coffee remains unchanged. Pig iron was increased from \$11.00 to \$12.00 vermiculite ore from \$13.00 to \$15.00, cargo N.O.S. unchanged, rates on animals unchanged, pyrothrum went up from \$4.00 to \$5.00 per ton, skins and hides from \$2.75 to \$5.00 per ton, tea from \$33.00 to \$36.50 per ton.

The rate on twine was not changed from the present rate of \$26.00 W.M. As you are aware our rate on this commodity amounts to \$30.00 W to the Atlantic \$35.00 W to the Pacific.

Yours very truly,

FOR NEDLLOYD LINE
Africa Service
JAVA PACIFIC LINE, INC.
General Agents
/s/ A. DROST

AD:cs

Enc.

cc: RL Rotterdam
Gen. Mgr., HAL Capetown
SMS/RL New York
TTC San Francisco

Exhibit 125

NEDLLOYD LINE

Nedlloyd Line, Amsterdam

May 13, 1955

RATES INCREASES FROM AFRICA

Gentlemen:

We wish to confirm the following cables sent you and Capetown Agents on May 11th:

P3400 93611 (TO CAPETOWN 11TH) S5300 FAR-REL ROBIN DREYFUS SAFMARINE LYKES WE AGREED INCREASES AS PER CIRCULARS ATTACHED OURLETS AMSTERDAM MARCH 24 28 MAY 9 BECOMING EFFECTIVE JUNE FIFTEENTH AS PER TARIFF RULE ONE G PLEASE AWAIT OURLET MAY 9 WHICH REVISING SOME INCREASES PROPOSED EARLIER P3534 PACIFIC RATES OURLETS MAY 5 APRIL 27 PLEASE ADVISE ACTION YOU WISH TAKE 63654 (REPEATED TO CAPETOWN #54)

We now enclose copy of a further Circular, dated May 11th, from the Secretary of the South Africa/U.S.A. Conference, indicating new rates becoming effective June 15th from outports with transshipment. The Secretary informs us that perhaps one or two items on this Circular are not quite correct as there is still some discussion on them and if it appears that changes are still necessary, we will advise everyone concerned immediately.

Exhibit 125

As to the Pacific Coast rates we note from your reply P6835 that you are writing us and we are looking forward with interest to receipt of your letter.

Yours very truly,

FOR NEDLLOYD LINE
Africa Service
JAVA PACIFIC LINE, INC.
General Agents
A. DROST.

AD:cs
cc: RL Rotterdam
SMN/RL New York
Gen. Mgr., HAL Capetown
TTC San Francisco
Enc.

Exhibit 127

NEDLLOYD LINE
Nedlloyd Line, Amsterdam

June 29, 1955

FERROCHROME IN DRUMS—BEIRA/U.S. ATLANTIC

Gentlemen:

With reference to our letters of June 13th and 17th, we would not fail to inform you that both the Conference and Robin Line, after having been notified by us of our reduction in the rate on this commodity, have decided to also reduce their rate to \$28.00 per 2240#.

They were, of course, not very well pleased with our independent action, however, we explained to them that in view of our earlier approach to them and their subsequent independent action, we considered ourselves entitled to also take independent action in connection with this commodity.

Yours very truly,

FOR NEDLLOYD LINE
Africa Service
JAVA PACIFIC LINE, INC.
General Agents
A. DROST.

AD:cs
cc: RL Rotterdam
SMN/RL New York
Gen. Mgr., HAL Capetown
KB London

Exhibit 128

NEDLLOYD LINE
Nedlloyd Line, Amsterdam

July 6, 1955

OPTIONAL DISCHARGE ATLANTIC COAST PORTS

Gentlemen:

Immediately upon receipt of Capetown Agents' letter to you of June 20th, we communicated with the Robin Line, informing them of the circular issued by their Mombasa Agents indicating that optional bills of lading will be issued for at least 6 ports out of the group of optional ports mentioned. The strange part is that recently Farrell and now we received copy of this circular, whereas the Robin Line claim they did not receive a copy themselves. On the other hand they read to us on the telephone copy of a circular purported to have been issued by our Mombasa Agents which would indicate that they are prepared to issue optional bills of lading without limit as to the number of ports. We did not receive a copy of the letter.

We suggested to the Robin Line that apparently actions taken by the respective Mombasa Agents in issuing these circular letters to shippers were based on what the other party did and the only way to solve the problem was that both they and we gave definite instructions to limit issuance of bills of lading to 4 ports in the Atlantic/Gulf range. They agreed to this proposed course of action and we, therefore, cabled you yesterday as follows:

P4500 OPTIONAL DISCHARGE CAPETOWNS
LETTER YOU 20/6 ROBIN PREPARED CABLE
MOMBASA LIMIT FOUR PORTS SAMETIME WE
CABLE MOMBASA DO LIKewise DO YOU AGREE

to which you replied today:

Exhibit 128

P7345 YES

We are now cabling Capetown Agents as follows:

S5700 OPTIONAL DISCHARGE URLET AMSTER-
DAM 20/6 AFTER CONSULTING PRINCIPALS
PLEASE INSTRUCT MOMBASA LIMIT TO FOUR
PORTS ATLANTIC/GULF ROBIN CABLING MOM-
BASA LIKEWISE TODAY

whereas Messrs. Robin Line are also instructing their
Agents by cable along the same lines.

We trust that there will be no further cause for mis-
understanding and meanwhile remain,

Yours very truly,

FOR NEDLLOYD LINE
Africa Service
JAVA PACIFIC LINE, INC.
General Agents
A. DROST.

AD:cs

cc: RL Rotterdam
Gen. Mgr., HAL Capetown
HAL Mombasa

Exhibit 129

(COPY)

NEDLLOYD LINE

October 7, 1955

**General Manager
Holland Africa Line (Pty) Ltd.
Capetown**

CAPOC

Dear Sir:

We wish to inform you that effective October 10th, the Conference and other Lines, including ourselves, included in their tariffs a rate of \$28.00 W/M on Capoc to Atlantic Coast/Gulf ports from Group 3 ports. Some time ago this item was dropped from the Tariff as there had been no movement and there were no prospects of any shipments coming forward. However, one of the Lines received an inquiry the other day and it was agreed to quote the above mentioned rate. It developed that the Dreyfus Line still have in their tariff a rate of \$30.50 W/M from B.E.A. outports for direct call and a rate of \$28.00 W/M is, therefore, considered appropriate from the regular Group 3 ports.

Yours very truly,

**For NEDLLOYD LINE
Africa Service
JAVA PACIFIC LINE, INC.
General Agents
/s/ A. DROST**

**AD:cp
cc: NLL Amsterdam
RL Rotterdam
HAL Mombasa**

Exhibit 131

(COPY)

NEDLLOYD LINE**January 27, 1956**

Mr. Alec Cocke
 Lykes Steamship Company
 Whitney Building
 New Orleans 11, Louisiana

FREIGHT RATES FROM AFRICA

Dear Alec:

Please be referred to my letter of January 23rd, specifically about freight rates on sisal from Africa to the Atlantic-Gulf, as compared with the rates from Indonesia, on which an increase had been announced effective March 1st.

In this letter I made reference to contemplated increases in freight rates from South and East Africa to Pacific Coast ports and in this connection I wish to inform you that today we are announcing to our clients that an increase of 15% to 20% will become effective on March 1st. To cite a few examples I mention below increases on some of the commodities:

Sisal & Sisal

Tow	from \$21.00 to \$25.00
Sisal Flume Tow	from 19.00 to 23.00
Coffee	from 40.00 to 45.00 from B.E.A.
Coffee	from 50.00 to 55.00 from Madagascar
Mica Waste	from 21.75 to 25.00
Chrome Tanning	
Salts	from 23.50 to 27.00
Sodium Bichro-	
mate in drums	from 26.50 to 30.50
Tea	from 41.50 to 47.50
Vermiculite	from 15.00 to 18.00

Exhibit 132

As to the rates on sisal, Sisal Tow and Sisal Flume Tow from Africa to the Atlantic-Gulf, as compared with the proposed new rates from Indonesia, I hope to receive the benefit of your views in due course.

Sincerely,

J. C. SEVERIENS

JCS:cp

cc: Mr. D. Colton

Lykes S.S. Co., N. Y.

Exhibit 132

(Copy)

NEDLLOYD LINE

January 27, 1956

Mr. J. Ponchelet
Sagns Marine Corp.
2 Broadway
New York 4, N. Y.

FREIGHT RATES FROM AFRICA

Dear Jack:

Please be referred to my letter of January 23rd, specifically about freight rates on sisal from Africa to the Atlantic-Gulf, as compared with the rates from Indonesia, on which an increase had been announced effective March 1st.

In this letter I made reference to contemplated increases in freight rates from South and East Africa to Pacific Coast ports and in this connection I wish to inform you that today we are announcing to our clients that an increase of 15% to 20% will become effective on March 1st. To cite

Exhibit 132

a few examples I mention below increases on some of the commodities:

Sisal & Sisal

Tow	from \$21.00 to \$25.00
Sisal Flume Tow	from 19.00 to 23.00
Coffee	from 40.00 to 45.00 from B.E.A.
Coffee	from 50.00 to 55.00 from Madagascar
Mica Waste	from 21.75 to 25.00
Chrome Tanning	
Salts	from 23.50 to 27.00
Sodium Bichro-	
mate in drums	from 26.50 to 30.50
Tea	from 41.50 to 47.50
Vermiculite	from 15.00 to 18.00

As to the rates on sisal, Sisal Tow and Sisal Flume Tow from Africa to the Atlantic-Gulf, as compared with the proposed new rates from Indonesia, I hope to receive the benefit of your views in due course.

Sincerely,

J. C. SEVERIENS

JCS:ime

Exhibit 133

(COPY)

NEDLLOYD LINE

cc: Mr. J. M. Phillips,
 Secretary
 South Africa/U.S.A.
 Conference
 January 27, 1956

Mr. J. Farrell, Jr.
 Farrell Lines
 26 Beaver Street
 New York 4, N. Y.

FREIGHT RATES FROM AFRICA

Dear Mr. Farrell:

Please be referred to my letter of January 23rd, specifically about freight rates on sisal from Africa to the Atlantic-Gulf, as compared with the rates from Indonesia, on which an increase had been announced effective March 1st.

In this letter I made reference to contemplated increases in freight rates from South and East Africa to Pacific Coast ports and in this connection I wish to inform you that today we are announcing to our clients that an increase of 15% to 20% will become effective on March 1st. To cite a few examples I mention below increases on some of the commodities:

Sisal & Sisal

Tow	from \$21.00 to \$25.00
Sisal Flume Tow	from 19.00 to 23.00
Coffee	from 40.00 to 45.00 from B.E.A.
Coffee	from 50.00 to 55.00 from Madagascar
Mica Waste	from 21.75 to 25.00
Chrome Tanning	
Salts	from 23.50 to 27.00
Sodium Bichro-	
mate in drums	from 26.50 to 30.50
Tea	from 41.50 to 47.50
Vermiculite	from 15.00 to 18.00

Exhibit 134

As to the rates on sisal, Sisal Tow and Sisal Flume Tow from Africa to the Atlantic-Gulf, as compared with the proposed new rates from Indonesia, I hope to receive the benefit of your views in due course.

Sincerely,

J. C. SEVERIENS

JCS:ime

Exhibit 134

(COPY)

NEDLLOYD LINE

January 27, 1956

Mr. C. H. McGuire
Robin Line
39 Cortlandt Street
New York, New York

FREIGHT RATES FROM AFRICA

Dear Chick:

Please be referred to my letter of January 23rd, specifically about freight rates on sisal from Africa to the Atlantic-Gulf, as compared with the rates from Indonesia, on which an increase had been announced effective March 1st.

In this letter I made reference to contemplated increases in freight rates from South and East Africa to Pacific Coast ports and in this connection I wish to inform you that today we are announcing to our clients that an increase of 15% to 20% will become effective on March 1st. To cite

Exhibit 136

a few examples I mention below increases on some of the commodities:

Sisal & Sisal		
Tow	from \$21.00 to \$25.00	
Sisal Flume Tow	from 19.00 to 23.00	
Coffee	from 40.00 to 45.00	from B.E.A.
Coffee	from 50.00 to 55.00	from Madagascar
Mica Waste	from 21.75 to 25.00	
Chrome Tanning		
Salts	from 23.50 to 27.00	
Sodium Bichro-		
mate in drums	from 26.50 to 30.50	
Tea	from 41.50 to 47.50	
Vermiculite	from 15.00 to 18.00	

As to the rates on sisal, Sisal Tow and Sisal Flume Tow from Africa to the Atlantic-Gulf, as compared with the proposed new rates from Indonesia, I hope to receive the benefit of your views in due course.

Sincerely,

J. C. SEVERIENS

JCS:cp

Exhibit 136

(Copy)

NEDLLOYD LINE

February 24, 1956

General Manager
Holland Africa Line (Pty) Ltd.
Capetown

MICA WASTE TO ATLANTIC/GULF

Dear Sir:

With reference to the cable exchange confirmed in our weekly letter to Principals of December 20, 1955, we wish

Exhibit 136

to inform you that the other Lines consulted with us regarding the newly established rate on this commodity. They pointed out that the reduction made on December 14th did not result in any shipments and importers stated that in view of the competition in this commodity from India, they were unable to do business with Africa.

They proposed a further reduction by \$1.00 and although we voiced our objection arguing that we could hardly believe that a \$1.00 reduction would be a deciding factor, the Lines nevertheless decided to fix the rates, effective February 23rd, as follows:

Group One	Group Two	Group Three	Group Four
\$20.00 Wt.	\$20.50 Wt.	\$21.00 Wt.	\$25.00 Wt.

Yours very truly,

For NEDLLOYD LINE
Africa Service
JAVA PACIFIC LINE, INC.
General Agents
/s/ A. DROST

AD:cp
cc: NLL Amsterdam
RL Rotterdam

Exhibit 137**NEDLLOYD LINE****(COPY)****September 18, 1956**

**General Manager
Holland Africa Line (Pty) Ltd.
Capetown, South Africa**

Paraffin Wax in Bags**Dear Sir:**

We acknowledge receipt of your letter of the 13th inst. regarding freight rate of \$18.50 per long ton fixed by the Conference Line on synthetic wax to Atlantic ports. We quite agree with your observations that carrying this commodity at this rate is not at all attractive.

As to reasons why the American Lines have taken this action it is perhaps useful to elaborate somewhat on the circumstances surrounding this. You will recall that some time ago, when the first inquiry was received on paraffin wax, we communicated with the American Lines here, at which time they assured us that they would quote the same rate as applying in the outward trade on this commodity since the inward tariff did not provide any rate. It was agreed at the time that we would quote the same rate and you have been negotiating on this basis with the shippers at yours. We were, therefore, much surprised to receive, on September 12th, a telephone communication from the Secretary of the Conference that effective that day the Conference had decided to fix a rate of \$18.50 weight on synthetic wax, which we presumed concerned the same commodity. We immediately communicated with Farrell as well as with Robin and expressed our annoyance at the action they took without first having consulted with us, especially as it had been previously agreed to quote the outward rate. This happened at about the same time they inquired with us about the \$18.50 weight rate, at which we had booked ferrochrome in bulk and to which reference is made in our

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today's weekly letter. They expressed dissatisfaction with our not having notified them of this before, however, the action they had taken on the wax rate without consulting us took the wind out of their sails.

A rate of \$18.50 weight on synthetic wax is, of course, extremely low but possibly it was necessary to make the import into the U. S. from Africa feasible, as it has not been previously imported. Perhaps you can obtain clarity in this respect from Messrs. Sasol.

Yours very truly

For NEDLLOYD LINE
Africa Service
JAVA PACIFIC LINE, INC.
General Agents
/s/ A. DROST

AD:cp

cc: NLL Amsterdam

RL Rotterdam

TTC San Francisco

HAL Durban

Exhibit 140

(Letterhead of)

S. A. G. E. T.

SOCIETE D'ARMEMENT DE GERANCE & D'ETUDES TECHNIQUES

Paris, le 20th January, 1955

Gulf/S.A. Line:
Mr Jack Ponchelet
New York

TARIFF INCREASE AND LYKES' AGREEMENT

Dear Mr Ponchelet,

Following our telex of to-day, we want to give you some additional comments:

As regards the general increase of 15% it seems that this is now as good as done with the only exceptions so being: Bitumen, Petroleum Products, Synthetic Rubber. Many of our objections are now withdrawn since we were advised, yesterday, by Messageries Maritimes that a few days ago the Continental and U. K. Conference to South Africa have decided to increase by 10% all rates to and from South Africa with several exceptions regarding the Northbound Traffic and the single, but important exception of Government cargo regarding the Southbound Traffic.

As regards our relations with Lykes, we agree with your viewpoint that for the present it is a sufficient step to start an agreement on rates similar to what we now have with Robin and Farrell, but we have indicated to you that you should leave the door open to something more comprehensive. The idea is that, if and when the rate agreement works satisfactorily, for some time, your contacts with Lykes should become more frequent and more friendly

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and, then, it might be easier to bring about something closer to what is our main purpose i.e. : an agreement to limit direct competition.

Our main difficulty at the present is that we do not have at our disposal all the tonnage we need to keep our commitments and it would be necessary to reduce the number of ships employed by Gulf/S.A. to 4 (possibly allowing for the employment of one additional time-chartered ship when necessary). This can be obtained by operating arrangements coupled with a reduction of our frequency, but in order to avoid losing ground to Lykes, both Lines should simultaneously reduce their number of sailings.

We believe that once the hatchet is buried, Lykes will favour any agreement which would permit them to cut down the number of sailings to 18 a year, for which they are subsidized; in that case, we would maintain our present proportions by having about 14 sailings a year instead of the 18/19, and 14 sailings a year would permit with some adjustments in the Schedules to employ only 4 vessels.

All this is of course for your own guidance, but we shall certainly need to reach that stage around July or August because by then we shall certainly feel the pinch as regards tonnage. When the time is ripe to negotiate the second stage, Mr. Moine will be quite ready to go over to help you in finalizing whatever can be done.

Meanwhile, we feel that we can wait and time is with us thanks to the very marked improvement in Southbound revenues.

Yours very truly,

(J. CASSEGRAIN)

JC/NC.

Exhibit 142**March 31, 1955****No. 529—Private****S.A.G.E.T. (GULFSA)—Paris GULFSA LINE DEPT.****MEMORANDUM OF MEETING OF REPRESENTATIVES OF CARGO
LINER SERVICES—U.S.A./AFRICA AND MADAGASCAR**

The following representatives met in the Conference Room of the South Africa/U.S.A. Conference at 26 Beaver Street, New York City, at 2:00 P. M., Thursday, March 24th, to discuss a general freight rate increase on north-bound traffics from B.E.A., P.E.A., South Africa to the U. S. Atlantic and Gulf ports:

Mr. John Phillips—Secretary—South Africa/
U.S.A. Conference

Mr. Clifford Shields—Vice President—Farrell
Lines, Inc.

Mr. F. J. Unver—General Traffic Manager—Far-
rell Lines, Inc.

Mr. Frank Smith—General Traffic Manager—
Robin Line

Mr. Alec Cocke—General Traffic Manager—Lykes
Steamship Co., Inc.

Mr. Richard Colton—Vice President—Lykes
Bros. Steamship Co., Inc.

Mr. Ferris O'Kelly—Assistant Secretary—Lykes
Bros. Steamship Co., Inc.

Mr. J. E. Ponchelet

Mr. I. H. P. Boyes

We proposed to convey hereunder as briefly as possible the discussions, item by item, in the order in which they were tabled at this meeting.

*Exhibit 142***1. VALIDITY OF RATES**

Clause No. 3 of the respective Lines' rules pertaining to the validity of rates provides for freight engagements to be committed for an advance period not in excess of sixty (60) days with the following exceptions: Chrome Ore, Manganese Ore, Lepidolite Ore, Copper (Blister), Ferrochrome, Ferromanganese.

Farrell proposed that this be amended to "the remaining days of the current month, plus thirty (30) days". The consensus of opinion was that the current sixty day rule was a more precise period for charterers to work on and it was agreed that the present rule should remain unchanged.

As regards the above exceptions, it was understood by all that commitments which had been made or which could be made would not extend beyond June 30th. (This of course does not apply to ore fixtures such as the Vanadium contract which was secured on Charter Party terms and conditions.)

2. AD VALOREM FREIGHT

Under Rule No. 5, a certificate is required to be furnished by the shipper, certifying the F.O.B. value of the consignment. The present form of certificate did not stipulate at what point in the over-all transit of the consignment the F.O.B. value is to be determined. For example, the F.O.B. value of Cloves shipped from Zanzibar would be considerably less than Cloves which had originated in Zanzibar and had been sold to a merchant in, say, P.E.A., who in turn resold them to a merchant in the United States. It had been noted that the merchant in P.E.A. had been declaring the value of the Cloves as that on the original certificate issued at Zanzibar.

It was proposed and agreed that the clause be amended to read:

"I/We hereby certify that the F.O.B. value at (Port of Loading) of (Commodity) to be shipped to

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(Consignment Port) in the (Country) is
per Bill of Lading ton."

3. BROKERAGE

The question of the payment of a commission or brokerage on shipments of bulk Lepidolite and Petalite Ores took place. Rule 11 provides for such a commission or brokerage to be paid at the rate in effect at the time of booking on Ores and Copper in bulk. It was noted by several representatives that this rule had been written into the Tariffs with respect to bulk Manganese, Chrome and Copper, no consideration at that time being given to commodities such as Lepidolite, Petalite, Vermiculite, etc., moving in bulk.

Opinions with respect to this matter differed somewhat. On the one hand, it was felt that by extending a brokerage to the new ores, it might give certain booking houses who handle large quantities of General Cargo an opportunity of seeking similar consideration. On the other hand, it was felt that as brokerage or commission was given with respect to Chrome, Manganese, Copper and full cargoes of Lepidolite, if the new ores were handled by booking houses or registered brokers, they should similarly benefit. It was mutually decided to give this subject further individual consideration.

4. PROPOSED RATE INCREASES

The meeting then proceeded with a review of the circular dated March 22nd issued by Mr. J. M. Phillips, copy of which is attached hereto, and the following comments and observations were tabled:

SIBAL: Robin, Farrell and the Conference had considered increasing the present main ports rates by \$2.00 per ton W/M. Lykes, however, had refused to consider an increase in excess of \$1.00 per ton W/M.

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It was pointed out by Mr. Phillips that the main competition to B.E.A. was Haiti, but that he (Phillips) had obtained an undertaking from the services operating between Haiti and the United States that whatever increase was applied to B.E.A. Sisal, they would follow suit. Notwithstanding this, Lykes reaffirmed their position and declined to consider an increase in excess of \$1.00 per ton W/M.

The freight rates applicable to the B.E.A. and P.E.A. Sisal outports were then discussed and with the exception of Mtwara, it was the general experience of the representative Lines that the present costs of bringing shipments from these small outports to main ports of shipment amounted to approximately $\frac{1}{3}$ of freight rates and it was proposed to increase the outport rates to cover the coastal freight charges to somewhere in the region of \$30.00 W/M. All representatives agreed to give this further consideration.

As regards Mtwara, Lykes pointed out that the present Direct Call Outport arbitrary of \$2.00 W/M over B.E.A. main ports rate was not competitive with the East Africa/Continent Conference arbitrary of \$1.25 W/M. As a result of this rate situation, European manufacturers were in a position to buy the Sisal from B.E.A., manufacture it into twine and resell it to the United States at a competitive price with local produce, resulting in loss of Sisal traffic by all Lines operating from this area to the U. S.

Although Mtwara carried a \$1.25 arbitrary in the East Africa/Continent tariff, it was understood that the Lines operating under this Conference more or less classified Mtwara as a main port, as most of their sailings called at this port. It was proposed that consideration be given by all representative Lines to reduce the current \$2.00 arbitrary to \$1.25 with respect to Mtwara in order to provide competitive rates with the East Africa/Continent Conference.

Note: During this discussion Lykes mentioned that they had carried from Mtwara to the Gulf a total of 3000 tons on seven (7) vessels and it was the feeling that this pro-

Exhibit 142

posal would largely favor Lykes who are engaged in the main movement of Sisal from this port to the U. S. However, Lykes intimated that currently the Sisal movement was to the Gulf, but if the G.S.A. chose to stockpile, then the Atlantic Lines would no doubt reap the same benefit and that in any case this action would assist the American manufacturers of twine to eliminate to some extent European competition.

Mr. Phillips was requested to make a further study of the East Africa/Continent Conference arbitraries as applied to the B.E.A. and P.E.A. outports and to furnish all attending representatives with his findings.

URANIUM

At the request of the South African Government Atomic Energy Commission, all Lines have been requested not to indicate in Tariffs or on cargo documents the fact that Uranium in drums was being shipped from the Union to the United States. It had therefore been agreed some time ago to classify this item in the Tariffs and on documents as "Mineral Ore in Steel Drums". Mr. Unver pointed out that this classification had led to certain shippers applying it to other than Uranium Ore, such as Beryl or Columbite Ore, etc. (presumably packed in steel drums) which according to the Tariffs would take the Mineral Scale, considerably higher than the \$49.50 W. Group 1 ports for the Uranium. It was mutually agreed that the classification "Mineral Ore in Steel Drums" was somewhat ambiguous and it was therefore proposed that it be reclassified as "Mineral Ore in Steel Drums (Uranium)". Several attending representatives immediately mentioned that the Union Atomic Energy Commission had requested that no mention of Uranium be made in the Tariff or cargo documents. Mr. Phillips pointed out that in the South and West African/Continent Conference mention was made in their Tariff of Uranium in steel drums and that the South African Government statistics of their imports and exports re-

Exhibit 142

flected the quantity of Uranium Ore they had shipped to various destinations, including the United States and which statistics were public information. It was decided that Lykes would cable the South African Atomic Energy Commission to secure their agreement to the above proposed classification.

BULK CHROME & MANGANESE ORE

Lykes and Farrell representatives expressed disapproval of L.D.C.'s full cargo fixtures of bulk Chrome Ore with a clause in the Charter Party providing for the full cargo to be shipped on one, two or three bottoms.

Lykes tabled the motion that this practice should be given serious consideration by all Lines and come to an agreement either that L. D. C. revert to the original practice of booking ores on their Gulf Service strictly in accordance with Tariff conditions, or declaring rates "open".

5. CROSSBOARD INCREASE

Lykes proposed that all commodities other than those listed in the attached memo be increased by roughly 10%, leaving it to Robin and L. D. C. to give detailed consideration to Madagascar/U. S. A. traffics and to submit a similar list to that of Mr. Phillips for further consideration by the Conference and Lykes.

6. NOTIFICATION TO INCREASE FREIGHT RATES NORTHBOUND

It was proposed that all Lines declare on April 30th to the trade that there would be a general freight increase (subject to the exceptions and agreed arbitrary increases outlined in the attached memo) to become effective June 1, 1955.

As no further northbound matters were brought before the meeting, it was then decided to take advantage of the meeting to discuss any other matter which was common to all the Lines.

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The question of the southbound Validity of Rates clause was then discussed and although Farrell Lines were not in complete accord, it was finally agreed among all representative Lines that the southbound Validity of Rates clause be amended effective March 24th to provide for a maximum advance booking period of sixty (60) days (identical to northbound). This will amend the Rule 1(J) in our new Tariff reading "current month plus thirty (30) days."

The meeting then dwelt at length on the question of Petroleum Products having been excepted at the time the 15% crossboard increase was instituted, effective March 1st. It was noted that Lykes had declared their intention to extend the old rates through June 30th and all other representative Lines had followed suit. Farrell and Robin representatives were to some extent of the opinion that Petroleum Products should not have been excepted. To this Mr. Alec Cocke pointed out that he had been in touch with senior representatives of the major oil companies who had informed him that it was largely a matter for the Lines to decide whether or not they wished to continue carrying this particular traffic, as if the Lines insisted on increasing the current rates on Petroleum Products by 15%, this could possible force the oil companies to meet their African commitments from primarily the U. K. and possibly Continental and other sources. Mr. Cocke was of the opinion that if this traffic was lost to other sources of supply, it could not be considered temporary but would be lost to U. S. A. exporters for good, as had occurred with U. S. shipments of Petroleum Products to at least one other destination. Mr. Cocke further stressed that exports of Petroleum Products formed the backbone of the volume of traffic from the U. S. Gulf to Africa and without this traffic, serious financial consequences could be envisaged. As regards the current freight rates, it was pointed out that from the Continent, the present rates in existence were \$11.90 W/M on packed Petroleum Products basis Cape Town and \$20.83 W. on bulk Lub-oil. From the U. S. Atlantic and Gulf the packed Petroleum Products rate was \$18.50 W/M basis Cape Town and bulk Lub-oil \$20.00 W., Cape Town and Durban only.

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No. 466

February 8, 1955

Messrs. SAGET, Paris (Gulfsa) *Agreement with Lykes*

Since my letter of January 29 there has been little to report regarding relations with Lykes or for that matter the announced 15% increase effective March 1st, Southbound, or the proposed increase Northbound.

In the interim, a Tariff was received from the Conference Headquarters in New Orleans—which is in effect Lykes' Southbound Tariff. We replied that we would send copies of ours to them and to Lykes. We also requested one more copy, which has been received and is in your hands by now.

With regard to the Northbound rate increases, no further discussions have taken place other than the exploratory one announced before, and the fact is that each Line is working on its own idea of exceptions, due for general discussion with the Conference Secretary towards the middle or end of next week.

No immediate discussion appears at hand although there is the expressed desire to increase rates generally.

Last Friday afternoon, O'Kelly of Lykes called to say that he had received a teletype message from Alec Cocke saying that Lykes were not going to increase the rate on Rice and Rice Products effective March 1st and would we follow suit?—The phrasing of the message was, to begin with, distasteful and represented a violation of the gentlemen's agreement which we had reached between Lykes and ourselves and as a matter of fact the agreement reached between Lykes and Safmarine. Specifically the message from Lykes should have come through in the form of a request for consideration, as we had all agreed. In other words, Lykes in this case should have called up to say that representations had been received from Rice exporters

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that a hardship was being worked on them if the rate were increased, and would consideration be given not to alter the rates.

This message passed on to us would then be considered and within a period of 48 hours (which was mutually established as being reasonable) also giving us time to get your views, we would have replied—and it would be understood that our reply would not be binding but merely an expression of opinion on a specific rate matter. I may say that this was the understanding with Safmarine as well.

I pointed this out to O'Kelly and while the conversation took place over the phone, I believe that he was genuinely embarrassed by Alec Cocke's stand. He said that he would go back over the matter but that in the meanwhile would we give him our opinion. I told him that I was not prepared to say whether we would or would not follow suit in that particular case without consulting you and did he wish me to place the matter before you and specifically the way in which Lykes had placed the problem before us, which did not please me, and I ventured the opinion that it would not meet with a friendly reaction on your part. This I communicated to O'Kelly and he then asked me to hold off until he could get Alec Cocke and Colton together on this question; that he was withdrawing for the moment any comments on this rice situation and would revert when he, Colton and Alec Cocke had reviewed the matter together.

In the meanwhile we, here, checked our impression with Leval's Rice Department, who were categorical in their statement that Rice would not move in any quantity to South Africa from the Gulf and that the matter of rate increase was actually academic. Actually, the rate for Rice in bags, to take an example is \$34.50 weight; this is according to Leval completely out of the market and it makes no difference whether you add 15% to it or take 15% off it because

Exhibit 143

the resulting rate is still far above the one at which business can be realized on the present market. Also is the fact that there has been virtually no movement of this commodity in our 2½ years of operation and as far as we can tell no likelihood of there being any important movement according to quite dependable sources here. Safmarine arrived at the same conclusion and, without consulting each other, notified Lykes at the same time, late Friday afternoon, of our respective feelings in the matter; we still, Sagus and Safmarine had not consulted each other.

Monday morning, Colton called me to say that he was following the matter but that he had been unable to reach Alec Cocke who was traveling for the moment and he asked that the matter be kept in abeyance until he could reach him. He also informed me at this time that Safmarine's reaction had been identical to ours on the two points, namely 1) that the manner of presentation had been found distasteful by Safmarine and 2) that Rice was a very poor commodity to choose as an exception, when in fact there was no movement of that cargo nor likely to be.

The matter is, as I write on Tuesday afternoon in status quo since Colton has requested that we disregard the question until he reverts on it.

I called Bill McGrath to get his reaction and he pointed out that it was another example of what he had experienced many times in the past (see paragraph 3 on page 3 of my letter of January 29) but that it could be considered a test case to determine if Colton here in New York was in effect able to speak for Lykes and not be the porteparole for Mr. Cocke's feelings and decisions in New Orleans.

I might interject at this point that during my conversation with Dick Colton, upon a certain verbal prodding from me, he stated: "after all Cocke is not running the show up here nor Lykes' relations with LDC. Cocke answers to Solon Turman as I do". I stated that my purpose was

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to reach a clear understanding with Lykes and would be happy for him to clarify the position as its earliest convenience as far as we LDC were concerned since obviously Cocke of Lykes was acting in a totally different way towards LDC and for that matter Safmarine than the one agreed upon by Mr. Colton of Lykes.

Dick Colton agreed that this was so and, as I said previously, he promised to call back to clarify the position.

Bill McGrath appeared very angry and said that if a clear cut answer was not forthcoming that he was finished talking with Lykes, and this after only ten days or so of some sort of relationship!

The expression "virtually" no movement is perhaps a little strong; movement of little consequence would be better since there has been two or three sporadic shipments in the Line history.

I mention this incident in some detail primarily to serve as background and also to give a concrete example of the situation which I have indicated exist in certain of my previous letters on this subject.

If Colton does come through with a clear cut statement, I shall of course relay it promptly to you; but I feel that this expose of an actual circumstance will form an important part of the background of our negotiations.

Upon my return from our meeting with Mr. Syl. Maddock and Frank Smith regarding Madagascar rates, Ferris O'Kelly called to say that Lykes was withdrawing their request re. the adjustment of the Rice rate.

He stated that he reserved the right to review the matter after March 1st, to which I called his attention that all of us reserved the right at any time to review any rate but that it was a matter of conforming to the procedure we had agreed upon, namely to submit the rate change on

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to the others, maintaining the right of all of us to act independently after this procedure had been adhered to.

O'Kelly stated that Bill McGrath was pleased at Lykes Brothers' attitude. I said that I was too. O'Kelly added gratuitously something to the effect that for once Lykes Bros. is considered friendly by everybody. No comment!

JEP:yt—cmd

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MESSRS. SAGET
Gulfsa Line Dept.
Paris

May 9, 1956

J. E. Ponchelet
Conference and Letters of Agreement

I am writing you the result of a luncheon with Mr. Colton of Lykes.

You will recall our correspondence regarding our becoming a signatory to the letter originally exchanged between Robin and Farrell and which was, after a great deal of discussion, declared to be worded in an acceptable form by the Maritime Commission.

I must say that around Christmas time when this matter first came up we were all under the impression—based on what Mr. Colton said at the time—that Lykes would be one of the first to sign. Last week, Mr. Colton told me that he and Mr. Turman, President of Lykes, advised Robin and Farrell that they did not wish to sign this agreement. Mr. Turman gave as the main reason the fact that Lykes did not wish, as a Gulf carrier, to link the various areas, i.e., USNA, US South Atlantic and Gulf in a more formal way. They let it be known that were a strong conference

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to come about Gulf/South Africa, that they would then without hesitation sign an agreement; but it would take the adherence of States Marine and ourselves together with Lykes to this conference before they would feel of a mind to do so.

I cannot say that I feel they are telling us everything on the basis of this statement since they were the first exponent of the theory that, failing a conference, the next best thing was some formal agreement in writing, not binding, but nevertheless with the spirit of getting together clearly expressed in a document of this kind.

Mr. Colton told me that he and Mr. Turman then saw Mr. Mercer and Mr. McGrath of States Marine. Mr. Mercer said that he did not wish to exchange any document with anybody nor did he wish to join a conference. He stated that he would at all time cooperate, particularly if it is a question of getting better rates; but that he wanted no formal agreement and stated that the South African Government opposed any policy of conference. He pointed out the fact that States Marine is a member of a great many conferences on their other services.

As of this day, the informal agreement, and as far as I know the spirit of it, has worked well for the past 15/16 months to a point that we have no reason to be dissatisfied with our competitors in the trade on the basis of their underquoting to get business, neither has any line a basis for reproaching us.

The market is strong so that there is little temptation to undercut. Our feeling all along, however, has been that by agreeing among ourselves we can improve the rate structure (not an across the board increase as before), but certainly by applying increases to certain specific commodities.

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We consequently are doing nothing more at the moment about signing an agreement pending the receipt of any comments from yourselves.

(Signed: JEP)

JEP:yt
c. c. Mr. Longcope
Gulfsa, N. Y.

Exhibit 176

U. S. DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

Washington 25, D. C.

Address Reply to
Maritime Administration
and refer to file no.
QM128/L25-23:610

July 18, 1957

Moore-McCormack Lines, Inc.
Five Broadway
New York 4, N. Y.

Attention: Mr. W. T. Moore, President

Gentlemen:

Subject: Acquisition of Seas Shipping Company's
Subsidized Vessels, etc.

Reference is made to the Secretary's letter of April 25, 1957 wherein you were advised of the Federal Maritime Board's action of April 24, 1957 with regard to the subject matter.

Exhibit 176

Your attention is directed specifically to item (8) on page 4, reading as follows:

"8. Determine that there shall be added to Moore-Mac's Contracts No. MCc-62436 and FMB-48 a provision similar to Article I-2(e) in Seas' Contract No. MCc-62432 which reads as follows:

"(e) The Operator will space the sailings of its vessels and establish, publish, and maintain rates, charges, classifications, tariffs, regulations and practices on a basis satisfactory to the Commission. The Operator further agrees that if the Commission determines that it is necessary to effect a pooling agreement covering homeward cargoes with any other line or lines using vessels registered in the United States, it will make every effort to effect such agreement so effected when approved by the Commission."

The Board, after taking the action referred to above, also directed that the Maritime staff discuss this matter with both Farrell Lines Incorporated and Moore-McCormack Lines, Inc., and report back to the Board with respect thereto.

As you are, no doubt, aware, the above quoted coordination clause is not fully comparable to the coordination clause presently incorporated in your Differential Subsidy Contracts Nos. MCc-62436 and FMB-48, applicable to the services on Trade Route No. 24, formerly operated by Moore-McCormack and Pacific Argentine Brasil Line, Inc. However, in view of Moore-McCormack's recent purchase of Pacific Argentine Brasil Line's vessels and the termination of Pacific Argentine Brasil Lines operating subsidy contract, by mutual consent, this particular provision of your subsidy contracts is of no further service.

Exhibit 176

The provision to which we refer reads as follows in your Contract No. FMB-48, which becomes effective January 1, 1958:

"I-2(e) To the extent from time to time prescribed by the United States, the Operator shall and it hereby agrees to coordinate the spacing, regularity and frequency of its sailings to and from all points on the subsidized service in conjunction with the operations of any and all other subsidized services on Trade Route No. 24. In addition to any other remedies which may be available to the United States, no subsidy shall be payable in respect to any voyage which does not conform to the requirements of the United States for such coordination of the spacing, regularity and frequency of the Operator's sailings, unless the United States determines that such failure to conform was caused by less than 30 days' notice of such requirement or by circumstances beyond the Operator's control. The requirement by the United States of such coordination shall constitute its consent thereto for the purpose of the provisions of Article II-18(c) hereof and any other provisions of contract or statute requiring such comment."

As you know, Article 1-2(e) of your current Operating-Differential Subsidy Agreement, Contract No. MCc-62436 is identical to the above quoted paragraph.

It is our belief that the foregoing coordination clause would better serve the purpose of all concerned than would the provision included in Article 8(e) of the Secretary's letter of April 25, 1956. If you would agree to the modification of this clause in each of your operating subsidy contracts Nos. MCc-62436 and FMB-48 by inserting "Trade Route No. 15-A" in lieu of "Trade Route No. 24" and

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Farrell, in the interest of uniformity, would agree to modification of its Operating Differential Subsidy Contract No. MCo-62430 so as to substitute the above quoted provision of Article 1-2(e) contained therein, we would recommend to the Board that your contracts be modified accordingly. If, however, this suggestion is not agreeable to you both, we shall be very glad to discuss this matter with both of you at your earliest convenience. On the other hand, if both Farrell and Moore-Mac are agreeable to this suggestion, we shall suggest each of you to advise us accordingly.

The suggestions contained above are predicated, of course, on Moore-Mac's joining the Conference, in accordance with Farrell's letter of April 10, 1957 to the Maritime Administrator and your letter of April 15, 1957 which was also addressed to the Administrator.

We are taking the liberty of forwarding a copy of this letter direct to Farrell Lines Incorporated.

Very truly yours,

ELMER E. METZ

Chief, Office of Government Aid

Farrell Lines Incorporated
26 Beaver Street
New York 4, N. Y.

Exhibit 177

U. S. A./SOUTH AFRICA CONFERENCE

February 16, 1955

To ALL LINES:

RATE INCREASES

Please note the following communication has been received from the Office of Regulation, Federal Maritime Board on the above:

"Information before us shows that your Conference has agreed upon a general increase in freight rates effective March 1, 1955.

For the information of the Board, it is requested that you furnish us a full and complete report setting forth the reason or reasons which in the opinion of the Conference justifies this general increase in freight rates."

J. M. PHILLIPS
Secretary

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FEDERAL MARITIME BOARD

WASHINGTON 25, D. C.

B. B. No. 41-5509 (9-55 Ex.)
MA-FL-161

IN YOUR REPLY
REFER TO FILE NO.
A17-9-1:070

February 11, 1955

Gulf/South and East African Conference
H. A. Carlys, Executive Secretary
1109-12 Whitney Bldg.
New Orleans 12, Louisiana

In re: Agreement No. 7780

Gentlemen:

Information before us shows that your conference has agreed upon a general increase in freight rates effective March 1, 1955.

For the information of the Board, it is requested that you furnish us a full and complete report setting forth the reason or reasons which in the opinion of the conference justifies this general increase in freight rates.

Very truly yours,

L. Tibbott
L. TIBBOTT
Chief, Regulation Office

2163 7 97

